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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THERESA REALI, MURRAY LEWIS, JOHN STOOS, JAY BAGGETT, and DON BLYTHE,

Petitioners,

v.

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners engaged in picketing and sidewalk counseling outside respondent's abortion facility. Respondent sued in California Superior Court and obtained permanent injunctive restraints, including a "speech-free zone" on the sidewalk in front of respondent's abortion facility. The superior court imposed on petitioners joint and several liability for respondent's attorney fees of roughly $100,000.00. The Court of Appeal of California affirmed. This Court granted certiorari, vacated the decision below, and remanded for further consideration in light of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). On remand, the state court of appeal adhered to its prior decision.

1. Does the imposition of liability for some $100,000 in attorney fees for unsuccessfully resisting injunctive restraints on nonlabor protest activities violate free speech and equal protection, where fees liability would not be available against identical labor protest activities?

2. Does the injunctive creation of a "speech-free zone" on a public sidewalk violate the right to free speech, assembly, and association where (a) the trial court imposes the "speech-free zone" as a first resort rather than as a last resort, and (b) there is no evidence of repeated unlawful conduct interfering with access?

3. In the absence of individualized findings of unlawful conduct, does the imposition of injunctive restraints and liability for some $100,000 in attorney fees, in the context of protected expressive activities, violate the federal constitutional rights to free speech, assembly, association, and due process?

4. In the context of protected expressive activities, when a trial court imposes injunctive restraints and liability for some $100,000 in attorney fees for alleged unlawful activity, does a reviewing court satisfy its First Amendment duty independently to evaluate the evidence when it views the evidence "in the light most favorable to the judgment"?

5. Do the injunctive restrictions at issue, and the award of over $100,000 in attorney fees predicated thereon, violate petitioners' rights to free speech, freedom of assembly, and freedom of association under the First Amendment?

6. Did the court below err by upholding, in conflict with the U.S. Court of Appeals for the D.C. Circuit, an injunction forbidding "inducing, encouraging, securing or causing" others to engage in prohibited picketing, distributing literature, and other activities?

PARTIES

In addition to the parties listed in the caption, the following were appellants in the court below: John Walker and Operation Rescue.

None of the petitioners is a corporation. *See* Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The original decision of the Third Appellate District of the Court of Appeal of California is published in part as *Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184 (1993) (App. 106a). The decision of this Court vacating that decision and remanding in light of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), is reported as *Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994) (App.

153a). The decision of the Third Appellate District on remand is published in part as *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (1995) (App. 1a). The order of the court of appeal modifying and denying rehearing of its original decision (App. 150a), the orders of the Supreme Court of California denying review of the original appellate decision (App. 152a) and of the appellate decision on remand (App. 154a), and the decisions and orders of the Superior Court of Sacramento County, California (Apps. B–M), are unreported.

JURISDICTION

The Court of Appeal of California entered its decision on remand from this Court on March 8, 1995. The Supreme Court of California denied review on June 1, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 1021.5 of the California Code of Civil Procedure provides as follows:

> § 1021.5. Attorney fees; enforcement of important rights affecting public interest
>
> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Cal. Civ. Proc. Code § 1021.5.

STATEMENT OF THE CASE

In this case a trial court, without finding that any of the petitioners (as opposed to other defendants or nonparties) had done or threatened anything illegal, took away their free speech rights and then forced them to pay over $100,000 in attorney fees for the privilege of losing those rights. The state court of appeal affirmed the trial court.

Petitioners are five individuals who oppose abortion as the unjustified taking of innocent human life. They engaged in picketing

and sidewalk counseling in an effort to communicate both this view and detailed information about alternatives to abortion, to women considering abortions, to the parents, friends, and companions of these women, and to the general public. Respondent Feminist Women's Health Center (FWHC) is an abortion business operating at four locations, including inside a multi-tenant medical office building at 3701 J Street in Sacramento.[1] The expressive activities of the petitioners at this location are the subject of this litigation.

Respondent FWHC filed suit for injunctive relief and attorneys' fees on January 6, 1989, naming as defendants the five petitioners, as well as John Anthony, Terri Doe, Steve Doe, 50 Doe defendants, and John Walker. FWHC later added Operation Rescue as a defendant. Neither John Walker nor Operation Rescue (OR) ever appeared, and the court entered default judgments against them.

FWHC obtained an *ex parte* temporary restraining order imposing various restrictions upon petitioners' expressive activities, including a "speech-free zone" in front of FWHC. App. B. The superior court subsequently amended the TRO twice, App. C, D, then replaced it with a preliminary injunction, App. F, which the court also amended, App. H, I.

The superior court initially created a "speech-free zone" extending 15 feet from each side of the front entrance of FWHC's facility. App. 52a. Shortly thereafter, the court reduced the zone to 10 feet from each side of the entrance. App. 56a. About six weeks later, the court expanded the zone to 20 feet from each side of the entrance but allowed petitioners access to a thin curbside strip of sidewalk within most of the zone. App. 67a.

Meanwhile, the petitioners filed a cross-complaint seeking to restrain FWHC's "clinic escorts" from interfering with petition-

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[1] FWHC subsequently relocated this facility. Because the award of $100,000 in attorney fees hinges upon the validity of the injunction FWHC obtained, this relocation does not affect the issues presented.

ers' attempts to communicate with FWHC's clients. The court sustained a demurrer to the cross-complaint. App. G.

In the first five minutes of the trial, the superior court ascertained that the petitioners were agreeable to an order prohibiting harassing and blocking FWHC clients, limiting the number of pro-life persons present at the facility at a given time, prohibiting the following of women who stated they did not wish to speak with the petitioners, and prohibiting any grouping of persons which would obstruct access to the facility. In addition, two of the petitioners, Jay Baggett and John Stoos, did not assert any right to engage in expressive activities in the parking lot.

Throughout the trial, counsel for the petitioners objected to the introduction of evidence concerning the conduct of non-parties. The court overruled these objections, based on the assurance of FWHC's counsel that he would "tie it up" at a later date. R.T. 156–59, 382, 836–47, 916–17. Ultimately, FWHC's counsel merely asserted that all anti-abortion demonstrators who had ever come to FWHC should be "tarred with the same brush." R.T. 837.

There was no evidence that petitioners were members of or affiliated with Operation Rescue. There was also no evidence that petitioners engaged in any blockades, vandalism, batteries, or other violent or destructive conduct.

Petitioner Jay Baggett testified generally about the goals of sidewalk counseling, and the means petitioners employed to speak to women and offer them information and alternatives to abortion. Baggett extensively rebutted the testimony of FWHC's witnesses regarding obstruction and other alleged unlawful conduct. He recounted assaults by FWHC employees and agents on petitioners and others. He also testified concerning the tactics FWHC employees used to prevent communication between the pro-life counselors and the clients, including interposing signs, umbrellas and their bodies between pro-life counselors and the women, shouting and making other noise to drown out the petitioners' offers of information, blocking the movement of the counselors and pushing

them away, and taking the literature away from either the counselors or the women.[2]

Petitioners also offered as evidence a manual, "CLINIC DEFENSE/ A Model," coauthored by FWHC's chief witness.[3] This manual, in the words of the court of appeal,

> describ[ed] suggested conduct of clinic escorts, including "bullying" prolife picketers with superior numbers, "dogging" prolife demonstrators, using visual blocks or chants to screen patients from prolife picketers, *falsely accusing prolife demonstrators* of unprivileged physical contact, committing acts of violence before police arrive, "baiting" prolife picketers with language having sexual or religious themes, and using the speech free zone for proabortion propaganda.

App. 8a (emphasis added). The superior court refused to admit this exhibit.[4]

Petitioner Baggett testified about several loud demonstrations held at FWHC during which abortion advocates gathered immediately in front of the building to chant, sing, and yell. Petitioners offered several photographs of these demonstrations as exhibits.[5]

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[2] The superior court in its final decision explicitly found the escorts' conduct "objectionable in many respects." App. 84a, n. 2

[3] Alison Gude, who is pictured on the cover and several other pages of the manual, not only authenticated the manual but also testified that the tactics described in the manual were "used by some escorts in California and throughout the country." She denied that they were used at FWHC.

[4] In addition to the manual, the trial court refused to admit a videotape showing FWHC's principal witness, Alison Gude, blocking, assaulting, and haranguing petitioner Don Blythe at another abortion facility during the same time the trial was pending in the instant case.

[5] It appears that the superior court, in issuing its statement of decision, mistakenly relied on these photographs of pro-abortion demonstrations to find that there were several occasions on which up to "150 [anti-abortion] picketers . . . would position themselves in front of Physician's Medical Building along the sidewalk on J Street . . . making a human wall which blocked the front entrance to the Physician's Medical Building." App. 80a. There was simply no evidence of any such demonstrations by pro-life picketers, other

On July 2, 1991, the superior court filed its final statement of decision and judgment. App. J. The final decision granted a permanent injunction against petitioners Don Blythe, Murray Lewis, Theresa Reali, Jay Baggett and John Stoos, prohibiting them, "and all persons, groups, and organizations acting in concert with one or more of them, who have actual notice," from:

> 1. Picketing, parading, marching, standing, occupying, assembling, grouping, gathering, or distributing literature in the following area: a zone 20 feet on either side of the front door at 3701 J Street, Sacramento, California, and extending from the building to the curb except that persons subject to this order may stand on the area in front of the 3701 J Street building on the sidewalk within three feet of the curb line, so long as they do not enter the area equal to the width of the door and extending from the front door of the building to the curb on J Street, except for transit purposes.[6]
>
> 2. Inhibiting or impeding or attempting to inhibit or impede the free and unmolested ingress to and egress from 3701 J Street, Sacramento, California, including blocking or attempting to block the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street.
>
> 3. Shouting, screaming, chanting, yelling or producing noise by other means, in a volume that substantially interferes with the provision of medical services by plaintiff.
>
> 4. Photographing or videotaping plaintiff's employees, agents, clients, visitors, or business invitees approaching, en-

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than the one Operation Rescue demonstration at which about 50 rescuers were present, and one large, non-obstructive picket held in compliance with the preliminary injunction.

[6] The court failed to mention that persons standing on the three foot strip of sidewalk by the curb are separated from people on the remainder of the sidewalk by two large six-foot wide planters, extending almost the entire length of the zone. *See* App. 54a.

tering, or leaving the premises at 3701 J Street, Sacramento, California.

5. Recording license plate numbers of vehicles delivering or removing plaintiff's employees, agents, clients, visitors, or business invitees from the premises at 3701 J Street, Sacramento, California.

6. Entering on the private parking lot which adjoins the back entrance of the building at 3701 J Street, Sacramento, California.

7. Interfering with or attempting to interfere with plaintiff's employees, agents, clients, visitors, or business invitees or with any automobile being driven or occupied by plaintiff's employees, agents, clients, visitors, or business invitees, as such persons or automobiles are entering or leaving the parking lot which adjoins the back entrance of the building at 3701 J Street, Sacramento, California.

8. Inducing, encouraging, securing or causing other persons to commit any of the acts in paragraph one through eight above.

App. 89a–90a.

On August 29, 1991, the court awarded attorney fees to FWHC as the prevailing party under California Code of Civil Procedure § 1021.5. While acknowledging this award to be "a harsh result, particularly in light of defendants' financial status," App. 95a, the court nevertheless imposed joint and several liability, for $99,106.98 in attorneys' fees, upon the five petitioners, John Walker, and Operation Rescue. App. 97a.

Petitioners appealed both the permanent injunction and the award of fees, and Operation Rescue and John Walker appealed only the award of attorneys' fees.

The Third District Court of Appeal upheld the injunction and affirmed the award of attorneys' fees as to all defendants except the defaulting Operation Rescue and John Walker. App. N.

Refusing to review the record independently, the court viewed the evidence "in the light most favorable to the judgment [below]." App. 108a, 118a. The court further held that there is "no requirement that the trial court provide separate findings for each defendant," App. 115a, and that "[n]o further specification is necessary" beyond generic findings as to "[d]efendants and others," App. 115a–116a. Treating the injunctive restraints as mere "time, place and manner restrictions," App. 107a, the court held that the permanent injunction was constitutional, App. 123a–125a. The court also rejected petitioners' constitutional objections to the $100,000 attorney fee award. App. 130a–137a.

Justice Puglia dissented from the portion of the decision upholding the fee award, citing *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886 (1982). Justice Puglia observed that "the trial court's findings do not parse out the legal from the illegal conduct or fix the responsibility individually for illegal acts and the proportionate impact of illegal conduct on [FWHC]'s litigation costs." App. 148a (footnote omitted). Because "constitutionally protected activity . . . predominated and thus more accurately characterizes [petitioners'] activities," App. 143a, Justice Puglia charged that the "inevitable consequence" of the fee award would be to "stifle the exercise of First Amendment rights not only by [petitioners] but by all others who in future will forswear their rights because they cannot afford financial penalties much less financial ruin as the price of exercising constitutionally guaranteed rights," App. 148a (footnote omitted).

The court of appeal denied petitioners' request for rehearing but modified several portions of its opinion without changing the disposition. App. O.

The Supreme Court of California denied review. App. P.

On February 9, 1994, the superior court awarded respondent an additional $30,601.50 for attorneys' fees incurred in resisting petitioners' appeal. *Feminist Women's Health Center v. Blythe*, No. 506341 (Cal. Super. Ct. Feb. 9, 1994). App. M. This award

brings the petitioners' total financial liability, including costs, fees, and interest, to over $155,000.00.

Petitioners sought review in this Court, which granted certiorari, vacated the decision below, and remanded for further consideration in light of this Court's intervening decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). *See Reali v. Feminist Women's Health Center*, 114 S. Ct. 2776 (1994) (App. Q) (order vacating and remanding).

On remand, the court of appeal adhered to its prior judgment, App. 1a, making several modifications in its opinion "occasioned by the Supreme Court's holdings in *Madsen*." App. 4a. The Supreme Court of California again denied review. App. R.

INTRODUCTION

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The allegation has been made that judges and even Supreme Court Justices deciding cases in the abortion context have "worked a major distortion in . . . constitutional jurisprudence," and that "no legal rule or doctrine is safe from ad hoc nullification" in such litigation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., joined by Rehnquist, J., dissenting); *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2535 (1994) (Scalia, J., joined by Kennedy and Thomas, JJ., dissenting). Indeed, the case law evidences such distortion. *See*, *e.g.*, *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986) (upholding restrictions on use of words "murder" and "kill" at abortion protests), *cert. dismissed*, 479 U.S. 1050 (1987).

Nevertheless, the notion of impartial adjudication—the core foundation of any judicial system—obviously requires the rejection of this pernicious "abortion distortion factor."

"Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." *Roe v. Wade*, 410 U.S. 113, 116 (1973). This Court must accordingly address the present petition independent of the national controversy out of which it arises. There are not different First Amendment rules for abortion protesters versus, for example, homosexual activists or civil rights demonstrators. Free speech is not the exclusive prerogative of those embracing favored causes or fashionable points of view.

REASONS FOR GRANTING THE WRIT

"First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963). In this case, however, the court below has placed the right to free speech within the legal equivalent of a high voltage fence. If the speaker—or a like-minded comrade—brushes too close to the outer bounds of the First Amendment, the result is not just an injunctive barrier but also a lethal jolt of attorney fees.

Indeed one need not even transgress the limits of free speech to run the risk of crushing legal liability. The Supreme Court of California has upheld, in a different case, the injunctive creation of a speech-free zone covering an entire sidewalk *where access was not an issue. See Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994), *vacated*, 115 S. Ct. 413 (1994), *on remand*, ____ Cal. 4th ____, ____ P.2d ____, ____ Cal. Rptr. 2d ____ (1995). In California, *any* pro-life picketing and leafletting risks the imposition of injunctive restraints plus attorney fees. If the judgment below stands, public protest in California may become the exclusive privilege of the judgment-proof and the reckless.

The decision of the Court of Appeal of California in this case, sustaining both a speech-restrictive injunction and an award of over $100,000 in attorney fees, represents a grave departure from the applicable decisions of this Court. The result is a clear threat to the vitality of the right to free speech.

First, in resting its holding on findings concerning "defendants and others," stating that "no further specification was necessary," the court effectively held that an injunction and crushing attorney fee awards may issue, not just against specific parties, but against a movement in general.

Second, the court of appeal based its holding on the trial court's findings of fact, as well as certain incidents taken from the trial record. These facts, however, whether stated by the appellate court, the trial court, or the respondent's witnesses, amount to little more than the sort of allegations which could be leveled at any demonstration, as perceived or characterized by persons hostile to the particular cause. In upholding the injunction based on these vague, insubstantial, and highly colored "facts", the appellate court showed the danger in allowing courts to cross the line from enjoining unlawful conduct to enjoining lawful expressive activity. If every court is licensed to restrict speech based on allegations of "obstructing" a driveway or sidewalk, "forcing" literature, or "surrounding" and "harassing" people, the constitutional right of free speech, rather than being a bedrock principle, hangs by a thread.

Finally, in upholding not only the injunction but liability for over $100,000 in attorneys' fees, based on findings that "defendants and others" were engaged in a melange of activities, some of which were unlawful but most of which were constitutionally protected, the court sanctioned the extreme chilling of expressive activity. The court allowed the equivalent of monetary sanctions against parties engaged in expressive activity, because those parties chose to defend their constitutional right to engage in such activity. This ruling says that peaceful, lawful activity provides no sanctuary for pro-life efforts.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *POLICE DEPARTMENT v. MOSLEY*.

By favoring labor protests over anti-abortion protests, the court below has applied the California attorney fees statute in a manner violative of both free speech and equal protection, in conflict with this Court's decisions.

California has adopted a statute allowing for the award of attorney fees to a successful party whose suit "resulted in the enforcement of an important right affecting the public interest," Cal. Civ. Proc. Code § 1021.5. For the prevailing party to recover fees, the suit must not only "enforce an important right affecting the public interest," but must also confer "a significant benefit . . . on the general public or a large class of persons," *id.* In addition, the "necessity and burden of private enforcement [must] make the award appropriate," and "the interest of justice" must call for not paying the fees "out of the recovery, if any." *Id.*

A California court of appeal has previously held that an abortion facility's suit to restrict pro-life protest activities qualifies for an award of attorney fees. *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 17 Cal. Rptr. 2d 510 (1993). One might have supposed that after *Aakhus*, any protester outside a business, including labor picketers, would stand in jeopardy of fees liability.[7] According to the court of appeal in the present case, however, this consequence does not follow. The threat of fees liability is reserved for only certain protesters, while others need not fear a fees award. In particular, the court below disavowed any attorney fees threat to *labor* picketing:

> Ordinarily, attorney fees pursuant to Code of Civil Procedure Section 1021.5 would not be warranted in an action to enjoin certain conduct of union members picketing their employer's business, *even if the picketers' conduct included actions un-*

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[7] *Aakhus* itself declared that "section 1021.5 is applied generally to all government and nongovernment persons and entities," *id.* at 175, 17 Cal. Rptr. 2d at 518.

> *protected by the First Amendment.* This is so because (1) injunctions obtained by employers do not necessarily confer a significant benefit upon the general public or a large class of persons, and (2) if employers champion only their individual property rights, the financial burden of litigation would not outweigh their personal stake in the matter.

App. 34a (emphasis added).

This reasoning supplies a ready recipe for content-discrimination of the most pernicious sort. According to the court below, a picketer's exposure to fees liability rests, not on the unlawfulness of the picketer's behavior, but rather on the court's subjective assessment of the "benefit" of the picketed business to the public. Presumably polluters and pornographers will not be able to recover fees against protesters, whether the protests are lawful or not. On the other hand, newspapers, law firms, and churches, for example —each of which can claim to confer significant public benefits and to implement important rights (free press, counsel, and free exercise, respectively)—would be entitled to fee awards against pesky protesters. Other businesses—auto dealers, restaurants, appliance stores, and so forth—apparently fall in the muddy middle, where they will have to argue for the public value of their goods and services as a predicate to recovering attorney fees.[8]

The absurdity, unfairness, and unworkability of the lower court's construction of § 1021.5 seem plain. But this Court must take the state law as the state courts interpret it. The federal question is whether employing the potentially crushing (as here) device of attorney fees liability only against those who protest certain "sacred cows" violates the rights to free speech and equal protection. The answer must be "yes."

This Court has long taught that both the right to free speech and the right to equal protection, under the First and Fourteenth Amendments, proscribe unequal treatment of picketers (or other

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[8] One might legitimately wonder why *all* businesses are not of benefit to the public, if only by fostering the economy.

speakers) on account of the content of their expression. *Police Department v. Mosley*, 408 U.S. 92 (1972). *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). Thus, for example, while a municipality may ban *all* single-residence picketing, *Frisby v. Schultz*, 487 U.S. 474 (1988), government may not forbid *only non-labor* residential picketing, *Carey v. Brown*, 447 U.S. 474 (1988). In the realm of free speech in public fora, government cannot favor certain topics with special burdens or benefits.

In the present case, the court of appeal has embraced two constitutionally incompatible propositions: First, abortion businesses may recover attorney fees as a matter of course against pro-life demonstrators. Second, businesses may not normally recover attorney fees against labor protesters. This distinction conflicts squarely with the rule of non-discrimination set forth in the prior decisions of this Court.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN*.

In conflict with this Court's *Madsen* decision, the court below sustained the creation of a speech-free zone on a public sidewalk as a "first resort" remedy, and in the absence of repeated unlawful interference with access.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court held that injunctive restrictions on expressive activity may "burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. This Court explained, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*, this Court stated:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate

> and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183–84. *See Madsen*, 114 S. Ct. at 2526.

The *Madsen* Court upheld a 36-foot speech-free "buffer zone" covering the sidewalk adjacent to a Florida abortion facility. In sustaining that extraordinary restriction, this Court emphasized the extraordinary circumstances of the case: the demonstrators "repeatedly had interfered with the free access of patients and staff" while on the adjacent sidewalk, *id.* at 2526, and "the state court originally issued a much narrower injunction, providing no buffer zone, [which] did not succeed in protecting access to the clinic," *id.* at 2527. Emphasizing that the "accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow of traffic on [the street]," 114 S. Ct. at 2528, this Court struck down those portions of the 36-foot buffer zone which were not "necessary" to secure access. "Absent evidence that petitioners standing on the [property in question] have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interests [at issue]." *Id.*

Madsen establishes that the drastic measure of a speech-free zone can pass constitutional muster only as a "last resort," and even then only to the extent actually *necessary* to safeguard access against repeated unlawful interference.

The decision below in the case at bar disregards these precepts.

The superior court created a speech-free zone as a "first resort," not a last resort. From the very first *ex parte* TRO through the permanent injunction, a speech-free zone (albeit of varying dimensions) remained in place. Apps. B, C, D, F, H, I, J. There never was a "narrower" injunction which prohibited only unlawful con-

duct.[9] Thus, there were no violations of such an order that could justify a more expansive restriction. Nor was there any way of determining that a narrower injunction would not suffice to ensure access while inflicting minimal damage to the First Amendment.

The court of appeal held that "nothing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite" to a zone. App. 23a. But *Madsen* does not approve the willy-nilly issuance of speech-free zones. And even if recourse to an initially narrower injunction is not *always* an absolute prerequisite, *Madsen* clearly endorses such a cautionary approach. In any event, *Madsen* requires evidence in the record that the zone burdens no more speech than necessary to protect access. The appellate court here simply made the conclusory statement that the zone was warranted "in light of defendants' actions, including their violation of the temporary restraining order." App. 24a. However, as noted above, the temporary restraining order itself imposed a speech-free zone. Moreover, the only evidence of any alleged violations was extremely ambiguous, involving distinctions between walking and standing in the zone. There was never any suggestion that any of the petitioners had violated the temporary restraining order by impeding access.

The appellate court attempted to bolster the case for the speech-free zone as a "first resort" by relying not only on the interest in protecting access, but also on the interest in reducing health risks to patients "by protecting the patients and medical staff from physical confrontations as they enter the clinic." App. 24a. However, *Madsen* provides no authority for the imposition of speech-free zones to further this broad and implicitly content-based interest. On the contrary, *Madsen* struck down a restriction on speech that was designed to protect patients and staff from personal confrontations. 114 S. Ct. at 2529.

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[9] Very early in this litigation, petitioners submitted a less restrictive injunction imposed in another case as an example of a narrower alternative to a speech-free zone. However, unlike the trial court in *Madsen*, the superior court here was unwilling to try this less burdensome alternative.

In *Madsen*, this Court reviewed an injunctive provision which prohibited, within 300 feet of an abortion facility, physically approaching any person seeking services "unless such person indicates a desire to communicate." *Id.* This Court held that the provision burdened more speech than necessary to prevent intimidation and ensure access to the facility. "Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand." *Id.* (citation omitted). "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* (internal quotation marks and citation omitted).

Many traditional forms of free speech involve face-to-face, physical confrontations—i.e., personal contact. *E.g.*, *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (circulating petitions; "the most effective, fundamental and perhaps economical avenue of political discourse [is] direct one-on-one communication"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (accosting strangers and challenging their religious beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (stationing "store watchers" outside boycotted businesses); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing outside business); *Lovell v. Griffin*, 303 U.S. 444 (1938) (leafletting). A desire to ban such "personal confrontations" cannot justify imposition of a speech-free zone on a public sidewalk.

Even limiting the issue to whether the zone was necessary to protect access, the appellate court simply made the conclusory statement that "there is substantial evidence" that the petitioners physically obstructed sidewalks to the facility. App. 23a. The court never specified where this substantial evidence is to be found in the record. Because of that failure, it is impossible to determine whether the evidence established a pattern of obstruction, or merely

one occasion of obstruction, or something in between.[10] *Madsen* does not sanction the imposition of a speech-free zone on the basis of "one-strike-and-you're-out," or even "three-strikes-and-you're-out." For a speech-free zone to be truly "necessary" under *Madsen*, interference with access must be not simply an isolated incident, or a sporadic occurrence, but a chronic, even inevitable, problem, as was the controlling assumption in *Madsen*.

Rather than granting courts carte blanche to impose speech-free zones, *Madsen* represents a unique response to an unusual situation. The court of appeal here, however, read *Madsen* as a license to impose zones, not only to protect access, but also to outlaw the mere "presence of antiabortion activities directly in front of the clinic . . . ." App. 21a. The court below reasoned that the very presence of anti-abortion speakers

> can have a coercive effect on both patients and providers. Patients may be forced to seek assistance elsewhere or forgo the procedure altogether, while providers may be forced to discontinue abortion services altogether because of continued harassment or pressure from building owners. In either event, the ability of a woman to effectuate her abortion decision would be compromised in violation of her rights.

Id. In other words, in the appellate court's view, courts may impose speech-free zones as part of a broader societal goal of preventing any "coercive" effect on patients or providers which could threaten the easy availability of abortion.

This rationale is fundamentally unsound. The claim that expressive activities are "intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). "Petitioners plainly intended to influence plaintiff's conduct by their activities; this is not fundamentally different from the function of a

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[10] This lack of specificity with respect to the record also prevents any determination of whether injunctive relief was necessary against each of the petitioners.

newspaper." *Id. See also NAACP v. Claiborne Hardware*, 458 U.S. at 909–10 ("Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action"); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picket was constitutionally protected even though purpose "was concededly to . . . induce such customers not to patronize the employer").

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *NAACP v. CLAIBORNE HARDWARE CO.*

The appellate court upheld an injunction and liability for over $100,000 in attorney fees without any findings that the individual enjoined petitioners—as opposed to other defendants[11] or "other anti-abortion protestors," App. 80a—actually engaged in or threatened any unlawful activity. This holding flies squarely in the face of this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The First Amendment rights to free speech, assembly, and association demand that a court carefully distinguish between lawful and unlawful activity, and between those who break the law and those who obey it. This Court explicitly so held in *NAACP v. Claiborne Hardware*. In that case, the Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court reversed, pointing out that the activists' behavior included both "elements of criminality and

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[11] The "defendants" referred to in the trial court's statement included not only the petitioners, but also defaulting parties John Walker and Operation Rescue. Only by including the acts of these other parties could the court's sweeping assertions about "the defendants' conduct" bear any resemblance to the trial court record. The court of appeal implicitly conceded that the case for the permanent injunction could not be made without the acts of the defaulting parties, when it deleted a sentence from its original opinion stating that any reference to "defendants" did not include Walker and Operation Rescue. App. 107a, 151a.

elements of majesty." *Id.* at 888. Justice Stevens, writing for this Court, emphasized the need to separate out lawful and unlawful activities before imposing remedial sanctions:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*

Id. at 916–17 (emphasis added and citation omitted). A judgment of liability "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties [used or] agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 933–34.

"For the same reasons," the Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. This Court declared that, at a minimum, "the injunction *must* be modified to restrain *only unlawful conduct* and the *persons responsible* for conduct of that character," *id.* (emphasis added). *Accord Madsen*, 114 S. Ct. at 2524 ("Injunctions . . . are remedies imposed for violations (or threatened violations)"); *id.* at 2524 nn. 2, 3 (injunction requires showing of unlawful conduct by defendant).

The court below completely disregarded this Court's teaching in *Claiborne Hardware*. Initially, the court stated, "A finding that 'defendants and others' engaged in the indicated conduct necessarily implies all defendants committed all the acts enumerated." App. 116a. When the petitioners sought rehearing and pointed out that the record was devoid of evidence of most of the petitioners having committed any unlawful acts whatsoever, the court of

appeal deleted this sentence from its final opinion while retaining the judgment, with the conclusion, "No further specification is necessary." App. 151a. The court of appeal treated the case as a *de facto* class action against an amorphous group called "anti-abortion protestors," App. 80a, with the petitioners recruited as the representatives of the class.[12] In so doing, of course, the court of appeal failed to provide petitioners with the procedural safeguards imposed on class actions to ensure due process to those whose rights may be affected by the litigation.

The injunction binds all persons acting in concert with petitioners, as well as forbidding all bound parties from encouraging anyone to commit any of the enjoined acts. Thus, the petitioners, and anyone acting in concert with them, are forbidden, for example, to encourage anyone else to "commit" picketing, assembly, or literature distribution in a fifty-foot zone on a public sidewalk. This ensures that, as a practical matter, no "anti-abortion protester" may enter the zone. In short, a restriction on speech originally justified as necessary to protect women from the unlawful conduct of a few, becomes a vehicle for excluding one viewpoint from public forum property precisely where the relevant audience is found.[13]

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[12] One state court has explicitly sanctioned such a "class-action" approach to abortion picketing cases. *See Planned Parenthood v. Project Jericho*, 52 Ohio St. 3d 56, 63, 556 N.E.2d 157, 165 (1990) (enjoining class consisting of "persons picketing [on specified public streets] who have been personally served with this order as well as . . . those persons in active concert or participation with them who receive personal service of the order").

[13] *See Cheffer v. McGregor*, 6 F.3d 705, 710–11 (11th Cir. 1993), *vacated on reh'g and remanded*, 41 F.3d 1421, 1422 (11th Cir. 1994) (en banc): "The practical effect of [enjoining Operation Rescue, individuals, and all persons acting in concert with them or on their behalf] was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not"; "[t]hat the restrictions at issue here are viewpoint-based cannot seriously be doubted."

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *THOMPSON v. CITY OF LOUISVILLE.*

The court of appeal upheld liability without individualized findings of illegal conduct. This ruling clearly conflicts with the requirements of due process. Just as "it is a violation of due process to convict and punish a man without evidence of his guilt," *Thompson v. Louisville*, 362 U.S. 199, 206 (1960), so it is a violation of petitioners' due process rights to hold them civilly liable, for both injunctive relief and over $100,000 in attorney fees, without evidence of unlawful acts. *Accord Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8 (1978) ("[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct") (internal quotation marks and citation omitted); *Madsen*, 114 S. Ct. at 2524 & nn. 2, 3.

V. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HURLEY v. IRISH-AMERICAN GLIB.*

This Court has repeatedly held that the duty of a reviewing court "is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

> Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, *without deference to the trial court.* . . . The requirement of independent appellate review is a rule of federal constitutional law, . . . which generally requires us to review the finding of facts by a State court where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. . . . This obligation rests upon us simply because the reaches of

> the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to make an independent examination of the whole record, so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2344 (1995) (emphasis added; citations and editing marks omitted). A reviewing court must "search the records . . . where a claim of constitutionality is effectively made," in order to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by *insubstantial* findings of fact screening reality." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982) (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1943)) (emphasis added).

The stakes in the present case include not just an injunction but also a crushing award of over $100,000 in attorney fees. The need to sift the record is painfully obvious. Yet the court of appeal, in plain defiance of this Court's teaching, eschewed any independent review of the record. Instead, the court explicitly "[v]iewed [the facts] in the light most favorable to the judgment," App. 108a.[14] In other words, according to the court below, the First

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[14] The lower court's initial opinion did not even pretend to have conducted an independent review. On remand from this Court, the court below paid lip service to the constitutional requirement of independent review, App. 4a, while in the same breath adhering to its actual review of the evidence "in light most favorable to the judgment," *id.*

Amendment is less important than deference to the trial court, *pace Hurley*.

Both the trial court and the court of appeal "screened reality" in their respective fashions. The trial court based its findings of unlawful conduct largely on the testimony of one witness, FWHC employee Alison Gude, whose testimony petitioner Jay Baggett directly contradicted.[15] In its findings of fact, the court embellished the evidence by implying that certain isolated incidents were regular occurrences and by suggesting that patients were actually blocked from entering.[16]

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[15] Moreover, the court did not allow the introduction of two exhibits (a videotape and a clinic escort training manual) directly challenging Ms. Gude's credibility, because of the danger of "undue consumption of time." *See supra* at 6 & note 4. The appellate court upheld the trial court's exclusion of the exhibits, on the grounds that, though relevant to Ms. Gude's credibility, the relevance was attenuated. App. 9a. The court discussed the manual as if it were a contract for future performance, rather than what each page of its contents manifested it to be: a detailed record of tactics developed and employed successfully by Gude and others to, as the manual itself puts it, "basically bully [pro-lifers] off the sidewalk."

As for the video, the petitioners were, from the outset of the lawsuit, enjoined from photographing or videotaping at FWHC. They offered the trial court the best evidence they could legally obtain—and the court refused it.

[16] For example, the single incidents of defaulting defendant Walker using a trumpet and a bullhorn were implicitly multiplied, as was the blockade by defaulting defendant Operation Rescue. App. 80a. The court stated that the defendants and others "would also block cars from entering the parking lot." App. 81a. The testimony presented was that cars had to slow down or "swerve" around the petitioners and others, not that the cars were blocked from entering. *Cf. Cheffer v. McGregor*, 6 F.3d at 711 & n.12 (cars having to "momentarily hesitate or stop until persons in the driveway moved out of the way" was an "inconvenience"; "[t]he clash here is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights").

Immediately following the sentence about blocking cars, the trial court related that "[o]n at least one occasion, a couple was forced to climb over the fence surrounding the parking lot in order to gain access to the rear entrance of the building." App. 81a. According to Ms. Gude, the couple had been approaching the front entrance, did not want to walk past the picketers, and

The court of appeal, far from "examin[ing] critically the basis on which liability was imposed," *Claiborne Hardware*, 458 U.S. at 915, engaged in the same practice of exaggeration and innuendo. The court corrected some of these embellishments after petitioners' filed a motion for rehearing, but most remained. Furthermore, the court upheld the lower court's refusal to differentiate between the acts of the petitioners, the acts of other defendants, and the acts of unnamed parties. This cavalier attitude toward the evidence and the issue of individualized proof is the antithesis of the critical examination and careful scrutiny this Court has mandated where First Amendment freedoms are at stake.

VI. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT AND WITH THIS COURT'S DOCTRINE OF ADVOCACY SPEECH.

The Court of Appeal of California upheld an injunctive ban on "[i]nducing, encouraging, securing or causing other persons to commit any of the acts" the injunction forbids. App. 90a. This is flatly inconsistent with a recent decision of the U.S. Court of Appeals for the D.C. Circuit as well as with the decisions of this Court.

It is well settled that the mere *advocacy* of conduct—even unlawful conduct—is within the scope of the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam); *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam). Government may only forbid speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

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so made their way to the back of the building. It was clear from the testimony that neither the petitioners nor any other prolife demonstrator even saw, much less blocked or intimidated, this couple. Yet the court implies just that.

NAACP v. Claiborne Hardware, 458 U.S. at 928. The injunction here bars petitioners from "securing or causing," or even merely "inducing" or "encouraging" others to, *inter alia*, engage in peaceful expressive activity on a public sidewalk. This portion of the injunction cuts directly and flagrantly into protected advocacy.

In *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), the U.S. Court of Appeals for the D.C. Circuit applied this Court's established constitutional doctrine and reached a result directly contrary to the court below.

At issue in *NOW v. OR* was, among other matters, injunctive language which banned "inducing" and "encouraging" others to engage in enjoined activities. *Id.* at 649. The defendant pro-life protesters argued that these broad terms could "encompass ordinary fundraising and organizing activities" and could proscribe "mere abstract advocacy of illegal sit-ins," *id.* at 656. After considering the possibility of construing these terms narrowly to forbid only incitement to imminent unlawful acts, the D.C. Circuit ultimately struck down these troublesome terms:

> By relying upon the terms "inducing" and "encouraging" rather than "inciting" to mean inciting, the injunction introduces an easily avoidable measure of unclarity as to what speech and conduct is prohibited. . . . Had the district court instead chosen its words more precisely, and used the term "inciting" to prohibit inciting, the injunction would have accomplished all it sets out to accomplish, while making it plain to all that no protected speech is impermissibly burdened. Reviewing the injunction under the demanding standard set out in *Madsen*, whether the challenged provisions "burden no more speech than necessary to achieve a significant government interest," *Madsen*, 114 S. Ct. at 2525, we conclude that the language of the injunction was vague enough to create an impermissible potential for overinclusiveness.

Id. The court instructed the trial court on remand to replace the offending terms "inducing" and "encouraging" with the word "inciting." *Id.* at 658.

The present injunction employs the terms "encouraging" and "inducing," the very same terms invalidated in *NOW v. OR.* The present injunction adds the terms "securing" and "causing," words which are essentially synonymous with "inducing." By sustaining this language, the court below rendered a decision in direct conflict with *NOW v. OR.*

CONCLUSION

The decision of the appellate court spells out a formula for restricting the free speech rights of unpopular groups.

The first ingredient is one or more defendants. The only requirement is that they have been at the scene of the protest; "no further specification is necessary."

The second ingredient is a few shreds of evidence that on some occasions, the expressive activity crossed the line into unprotected conduct. The scantiness of the evidence or the lack of credibility of the source is no bar; appellate courts will give full deference to the trial court in the exercise of its discretion. Evidence against unnamed individuals is also acceptable, despite the fact that these individuals will not be present to cross-examine the witness or respond to the testimony.

Finally, financial liability—even a $100,000 attorney fee award, as in this case—may be imposed on the defendants if they attempt to defend their constitutional rights. The indisputable effect of this imposition will be the chilling of both the exercise and the defense of such rights.

The power to prohibit free speech by disfavored groups does not belong to any branch of government, whether legislative, executive, *or* judicial. This Court should grant the petition for certiorari.

Respectfully submitted,

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August 30, 1995

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Sacramento County)

C011874

(Super.Ct.No. 506341)

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff, Cross-Defendant and Respondent,

v.

DON BLYTHE, et al.,

Defendants, Cross-Complainants and Appellants.

CERTIFIED FOR PARTIAL PUBLICATION*

[Filed March 8, 1995]

APPEAL from an order of the Superior Court of Sacramento County, James L. Long, Judge. Reversed in part, affirmed in part.

Michael D. Imeld, Mike Millen, and David L. Llewellyn, Attorneys for Defendants, Cross-Complainants, and Appellants.

Mark E. Merin, Dickstein & Merin, and Fred J. Hiestand for Plaintiff, Cross-Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and II.

In *Feminist Women's Health Center v. Blythe* (1993) 17 Cal.App.4th 1543, we addressed defendants' challenges to the trial court's issuance of a permanent injunction imposing time, place and manner restrictions on the activities of antiabortion demonstrators at plaintiff's Sacramento clinic, and to the court's order awarding plaintiff attorney fees pursuant to Code of Civil Procedure section 1021.5.[1]

Rejecting defendants' attack on the propriety and scope of the permanent injunction, we concluded: the evidence supported a finding that their conduct posed a significant threat of harm to plaintiff's patients, infringed upon the patients' right to privacy, and would continue if not enjoined permanently; the designation of a "speech free zone" in front of plaintiff's clinic and the building's private parking lot driveway was based not upon the content of defendants' speech but upon conduct of defendants which was unprotected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution; and the injunction was tailored narrowly to protect the patients' privacy interest while providing defendants with ample opportunity to communicate their antiabortion message.

Upholding the attorney fee order as to all defendants except John Walker and Operation Rescue, we concluded: the record supported the trial court's finding that plaintiff did not have a sufficient financial interest in this litigation to preclude an attorney fee award and that plaintiff's primary motivation in seeking the injunction was to further the public interest of protecting its patients' constitutional rights to abortion by ensuring that their access to abortion services was not restricted unlawfully; and the

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[1] A joint notice of appeal was filed by all defendants. In that notice, defendants John Walker and Operation Rescue appeal only from the order awarding attorney fees. The remaining defendants appeal from both the judgment granting the permanent injunction and the order awarding attorney fees. Because Walker and Operation Rescue do not appeal from the judgment granting the permanent injunction, we need not address any contentions in their briefs relating to that judgment.

attorney fee award would not operate to chill the constitutional rights to freedom of speech because even the most naive person would have known defendants' conduct—obstructing access to the clinic and engaging in acts of assault and harassment to prevent women who had expressed disinterest in defendants' views from exercising the constitutional right to abortion—was not protected by the First Amendment to the United States Constitution or by article I, section 2 of the California Constitution, and because the attorney fee order did not prevent defendants from continuing to demonstrate and exercise their freedom of speech within the lawful limits set forth in the injunction.

We reversed the attorney fee order as to defaulting defendants Walker and Operation Rescue because plaintiff's complaint did not demand such attorney fees and Code of Civil Procedure section 580 precludes an award against a defaulting defendant which exceeds the relief demanded in the complaint.

The unpublished portions of our opinion rejected defendants' contentions that the trial court erred in ruling on the admissibility of certain evidence and that the court's statement of decision is inadequate.

In *Reali v. Feminist Women's Health Center* (1994) ____ U.S. ____ [129 L.Ed.2d 888], the United States Supreme Court vacated our judgment and remanded the matter to us for further consideration in light of *Madsen v. Women's Health Center* (1994) 512 U.S. ____ [129 L.Ed.2d 593], which was decided after our opinion in *Feminist Women's Health Center v. Blythe*, *supra*, 17 Cal.App.4th 1543. In *Madsen*, a case involving an injunction which prohibited antiabortion protesters from demonstrating in certain places and in various ways outside a health clinic that performed abortions, the Supreme Court set forth and applied a standard for evaluating the constitutionality of content-neutral injunctions which restrict speech.

At our invitation, the parties in this case have submitted briefs addressing what effect the holding in *Madsen* has on the issues

raised by defendants. Having complied with the directive of the United States Supreme Court, we conclude that application of the standard of review set forth in *Madsen* does not alter the outcome we reached in *Feminist Women's Health Center v. Blythe*, *supra*, 17 Cal.App.4th 1543. Accordingly, we shall republish our opinion therein with modifications occasioned by the Supreme Court's holding in *Madsen*.

FACTS AND PROCEDURAL BACKGROUND

Having undertaken " 'an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499-501, 507-511 [80 L.Ed.2d 502, 515-517, 521-523]), we find that the evidence supports the judgment. Summarized in the light most favorable to the judgment, and stated in the present tense as they existed at the time of the trial court hearings in this action, the facts are as follows:

Plaintiff is a nonprofit corporation operating four medical clinics in Northern California, including one located on J Street in Sacramento (hereafter "the clinic") which is the subject of the injunction in this case. The clinic is open six days a week and provides gynecological health care, birth control services, pregnancy testing and screening, sexually transmitted disease testing and screening, and abortions. The clinic is on the second floor of a medical building in which several doctors' offices and a pharmacy also are located. The front entrance of the building opens onto a sidewalk running parallel to J Street along the entire length of the building and extending from the front of the building to J Street. The back entrance opens onto a 40-space parking lot to which there is access from I Street. Signs posted in the parking lot state that it is reserved for the use of tenants of the building and their customers and that trespassers will be prosecuted under Penal Code section 602 (trespassing).

Defendants are Jay Baggett, Don Blythe, Murray Lewis, Theresa Reali, John Stoos, John Walker and Operation Rescue (hereafter we shall refer to these parties collectively as "defendants"). According to the record, Operation Rescue is a national antiabortion group whose members are willing to risk arrest in an effort to blockade abortion clinics and make it impossible for patients to enter medical facilities where abortions are performed. There is no evidence that any of the individual defendants are members of, or affiliated with, Operation Rescue.

The clinic opened in June 1987. Defendants commenced antiabortion demonstrations there in early 1988. Every Saturday, one or more of the defendants and others would arrive at the clinic and use various techniques in an effort to counsel patients and persuade or stop them from submitting to abortions. These techniques included picketing in front of the medical building and in the parking lot, distributing antiabortion literature both inside and outside of the medical building, blocking or impeding entrance to the building and the parking lot, hitting the hoods of cars entering the parking lot, blocking the doors of arriving patients' vehicles in the parking lot so that patients had difficulty getting out and entering the clinic, following patients in order to give them literature even if the patients indicated they were not interested, stepping into the paths of patients as they approached the clinic, urging patients not to "kill" their babies, shouting "murder, murder, murder" at patients, and pointing cameras at them.

The antiabortion demonstrations have caused problems for patients trying to enter the clinic. As previously noted, among other things demonstrators have blocked patients at the entrance to the medical building and have refused to leave. The clinic has received telephone calls from patients in nearby phone booths complaining they were unable to enter the clinic. When clinic staff offered to help and went out to escort those patients into the building, the patients sometimes could not be found. Other patients rescheduled appointments to avoid the demonstrations and called the clinic to request escort assistance into the building. Several times, police

assistance has been necessary to stop blocking of the parking lot and building entrance and other activities of the demonstrators. After the district attorney's office declined to prosecute defendants who had been arrested for trespass, the parking lot "became a sort of battleground," and patients were unable to get out of their cars or enter the building without being subjected to the conduct summarized above.

The noise made by picketing demonstrators and the confrontations and other activities initiated by defendants and others at the clinic have upset and agitated clinic patients. In some instances, patients have been reduced to tears. This heightened level of anxiety has required that abortion patients receive greater amounts of medication and has lengthened the time necessary to perform abortion procedures, thereby increasing the risks to patients. Heightened anxiety of staff members, including the doctors performing abortions, has impaired their concentration, further increasing the risks to patients.

On January 6, 1989, plaintiff obtained a temporary restraining order imposing time, place and manner restrictions on the antiabortion activities of defendants as well as their agents, servants, employees and representatives. On March 6, 1989, the court granted plaintiff's motion for a preliminary injunction.

After the temporary restraining order and preliminary injunction issued, antiabortion activities at the clinic continued, including the use of cameras, bumping into and pushing aside "escorts" hired by the clinic to assist patients in entering the building, following patients into restricted areas, blocking cars attempting to enter the parking lot, persisting in offering literature refused by patients, blocking passage on the sidewalk in front of the medical building, and picketing in restricted areas.

Defendants John Walker and Operation Rescue did not appear, and a default judgment was entered against them. Plaintiff's application for a permanent injunction was tried against the remaining defendants, and judgment was entered in plaintiff's favor for a

permanent injunction prohibiting (1) any activity within a "speech free zone" defined as a rectangle extending from the front of the medical building to 3 feet short of the curb on J Street and 20 feet on either side of the front door, (2) blocking ingress and egress of clinic patients and staff on the sidewalk in front of the medical building, (3) yelling or otherwise producing loud noise which interferes with clinic operations, (4) photographing or videotaping clinic patients, visitors or staff, (5) recording license plate numbers of vehicles visiting the clinic, (6) entering the medical building parking lot, (7) interfering with automobiles entering or leaving the parking lot, and (8) inducing others to do any of the above.

Following trial, plaintiff moved for an award of attorney fees pursuant to Code of Civil Procedure section 1021.5. The court awarded $99,106.98 against all defendants jointly and severally, including Walker and Operation Rescue.

DISCUSSION

I *

Defendants offered two exhibits—a 35-page document entitled "CLINIC DEFENSE/A Model" (hereafter "Exhibit CC"), and a videotape showing conduct by clinic escorts outside another Sacramento abortion clinic (hereafter "Exhibit II")—as relevant to the credibility of plaintiff's witnesses and to the issue of defendants' right to reasonable opportunities to communicate their views through picketing and demonstrating. As to those issues, the evidence showed that, in order to counter defendants' activities, plaintiff arranged for escorts to meet patients at their cars or as they approached the medical building and to walk with them to the clinic. Defendant Jay Baggett testified that these escorts often shielded patients from demonstrators, making communication impossible. According to Baggett, the escorts, and in particular plaintiff's escort coordinator, Allison Gude, were verbally and physically abusive, took prolife literature away from patients, held umbrellas or signs between demonstrators and patients, interfered

with conversations between demonstrators and patients, mocked demonstrators and threatened them.

Gude, who provided much of the evidence regarding the post-temporary-restraining-order conduct of defendants and others, denied interfering with the ability of demonstrators to communicate with patients, denied initiating physical contact with demonstrators, and testified she was unaware of any escorts shielding patients with signs.

Defendants contend the trial court erred in refusing their offer of Exhibits CC and II without first reviewing the exhibits. Defendants' offer of proof was submitted in writing in a 28-page document. In addition to describing the purpose and relevance of the evidence, this document included excerpts from Exhibit CC describing suggested conduct of clinic escorts, including "bullying" prolife picketers with superior numbers, "dogging" prolife demonstrators, using visual blocks or chants to screen patients from prolife picketers, falsely accusing prolife demonstrators of unprivileged physical contact, committing acts of violence before police arrive, "baiting" prolife picketers with language having sexual or religious themes, and using the speech free zone for proabortion propaganda. The written offer of proof described Exhibit II, the videotape, as showing Gude and other escorts "using tactics described in [Exhibit CC]." Defendants made additional offers during the course of trial.

Defendants cite no authority requiring the trial court to review the exhibits themselves before making its ruling. When an objection is raised to the admission of evidence, the proponent normally is required to make an offer of proof setting forth with specificity the "substance, purpose, and relevance" of the evidence. (Evid. Code, § 354, subd. (a); 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, §§ 2041–2042, pp. 2000–2001.) The court makes its ruling based on this offer of proof. Defendants' 28-page written offer of proof was sufficient for the court to determine whether exhibits CC and II should be admitted. Nothing more

would have been gained by reviewing the exhibits themselves. To the contrary, the offer of proof was more focused and explicit in highlighting the relevant portions of those materials.

Defendants contend that, in any event, the trial court erred in rejecting their offer of proof. The court excluded the evidence on the basis of Evidence Code section 352, concluding its probative value was "substantially outweighed" by the threat of undue consumption of time. Evidence Code section 352 permits the exclusion of relevant evidence under these circumstances in the discretion of the trial court, and the exercise of such discretion shall not be disturbed on appeal absent a clear showing of abuse. (*People v. Barrow* (1976) 60 Cal.App.3d 984, 995.)

To the extent the exhibits tended to impeach Gude's testimony regarding escort conduct, they were relevant as defendants suggest. However, this relevance is attenuated. Although Gude is pictured on several pages in Exhibit CC and acknowledged having prepared a portion of it, Exhibit CC actually was created by BACAOR, the Bay Area Coalition Against Operation Rescue, and was written in March 1990, after the events involved in this dispute and after Gude ceased functioning as escort coordinator for the clinic. Furthermore, the portion prepared by Gude related to temporary restraining orders and did not deal with any escort conduct of which defendants complain. Exhibit II similarly depicts conduct by Gude at another abortion clinic after she ceased functioning as escort coordinator for the clinic.

The trial court concluded that introduction of the exhibits would cause undue consumption of time. This was consistent with repeated rulings by the court excluding evidence presented by either side regarding conduct at other abortion clinics. The court was concerned such testimony would invite additional evidence regarding conduct at all other clinics by any of the clinic escorts, the individual defendants or Operation Rescue. The same can be said of Exhibits CC and II. Their introduction would have invited evidence of escort conduct at all clinics during any period of

time. Though relevant to demonstrate that the escort techniques outlined in Exhibit CC and depicted in Exhibit II were followed elsewhere and at other times, which in turn would raise an inference that those techniques were used at the clinic, this easily could result in a substantial prolongation of the trial. The trial court did not abuse its discretion in concluding this risk outweighed the marginal probative value of the evidence.

In a footnote in their brief, defendants also contend the trial court erred in excluding proffered expert testimony regarding what information women should be provided before deciding to have an abortion and what they should be told about Dr. Steir's background, i.e., malpractice claims asserted against him and the suspension of his surgical privileges elsewhere. However, because these points were not presented under separate headings or subheadings and because defendants have provided no argument or authorities in support of the contention, it is deemed waived. (Cal. Rules of Court, rule 15(a); *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

II *

Defendants next challenge the adequacy of the trial court's statement of decision.

Upon request of a party following a bench trial, the court must issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) A request for statement of decision must specify the issues to be covered and must be filed within 10 days of announcement of a tentative decision. (*Ibid.*) Thereafter, the court shall issue a proposed statement of decision, to which the parties may file objections after which the court issues its final statement of decision and judgment. (Cal. Rules of Court, rule 232.)

Following trial in this case, the court issued a statement of decision and judgment granting a permanent injunction. Defendants

filed a request for specification of issues and objections to the statement of decision, after which the court issued its final Statement of Decision and Judgment. This 17-page document outlined in detail the specific conduct of "defendants and others" justifying injunctive relief. It also undertook to justify the scope of the injunction and to demonstrate that the injunction was content neutral and was narrowly tailored to provide ample alternatives. In addition, it gave reasons for the noise limitations and prohibitions against cameras and recording of license plate numbers.

Defendants contend the statement of decision is inadequate because it fails to differentiate among the various defendants and others involved in antiabortion activities at the clinic. According to defendants, the trial court was required to specify which individuals participated in which acts. Otherwise, they argue, review of their challenges to the sufficiency of the evidence will be "difficult at best."

There is no requirement the trial court provide separate findings for each defendant. All that is required in a statement of decision is an explanation of the factual and legal basis for the ultimate decision on the principal controverted issues. (*Hellman v. LaCumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) Here, the statement of decision indicated, for example, that "[d]efendants and others, on a fairly regular basis between January of 1988 and April of 1990, have gathered in front of the Physician's Medical Building at 3701 J Street to demonstrate against abortions[,]" "would waive signs at plaintiff's clients and staff[,]" "would also chant, yell and use noise-making devices such as bullhorns and trumpets[,]" "would also attempt to force literature on plaintiff's clients[,]" "would persist in their attempts even after the client indicated her refusal[,]" "would reach for, bump into and surround plaintiff's clients and any persons accompanying the clients[,]" and "would record the identities of [plaintiff's] clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers." No further specification is necessary.

In their supplemental brief, defendants intimate that *Madsen v. Women's Health Center*, *supra*, 512 U.S. ____ [129 L.Ed.2d 593] requires that specific findings of misconduct be made as to each defendant, rather than the trial court's generalized finding that defendants and others engaged in the enumerated wrongful acts. Apparently, they believe the injunction cannot stand unless every defendant engaged in each of the acts specified by the court. We disagree. Nothing in *Madsen* supports defendants' position. It is sufficient the trial court found that defendants engaged in particular harassing and obstructive conduct and that the evidence discloses each of the defendants committed one or more of the listed acts.

Defendants also contend the statement is inadequate because it contains no findings regarding escort conduct, which they argue is necessary in order to determine if the injunction affords them adequate means of communication. This is not supported by the record. Among its many other findings, the court in the statement of decision found defendants "are not deprived from reaching and winning the attention of plaintiff's clients merely because they are not permitted into a certain zone extending out from either side of the main entrance to the Physician's Medical Building. Defendants have not been removed to a nonaccessible location; they may still protest and carry signs in plain view of persons entering the Physician's Medical Building. They are also still free to express their message, counsel, or hand out literature to any passerby. If one of [plaintiff's] clients desires to receive information bearing on her decision not to have an abortion, the client is free to walk over to defendants and engage them in conversation."

Necessarily included in the court's finding that defendants are not precluded from communicating with clinic patients is an intermediate factual determination that escort conduct, whatever it might be, does not interfere with such communication. "[A] trial court rendering a statement of decision under Code of Civil Procedure section 632 is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily in-

clude findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]" (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 599.) Here, the ultimate fact was whether defendants had an adequate means of communication despite the injunction and escort conduct. The nature and effect of escort conduct is subsumed within this ultimate fact. The statement of decision is adequate.

The defendants' objections set forth specific, additional issues they wished to have addressed in the statement of decision, such as whether the sidewalk in front of the medical building is "a traditional public forum" and what evidence exists that others were acting as agents for the answering defendants. The statement of decision did not address these issues. However, defendants do not contend on appeal that the trial court's failure to include a discussion of these issues was error. Accordingly, the issue is waived.

III

Defendants contend their conduct was not sufficiently egregious to warrant entry of a permanent injunction because their conduct did not involve unlawful violence or threats of violence. In support of their argument, defendants note that the cases upon which plaintiff relied in the trial court to support injunctive relief, *Steiner v. Long Beach Local No. 128* (1942) 10 Cal.2d 676 and *M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union* (1981) 124 Cal.App.3d 666, involved violence and threats of bodily harm. In defendants' view, because the evidence of their conduct is not as "extreme" as the facts which justified injunctive relief in *Steiner* and *M Restaurants*, this case does not come "within the sweep of the *Steiner* and *M.* [*sic*] *Restaurants* cases." The contention has no merit.

Violence or the threat of violence is not a necessary prerequisite to the issuance of an injunction. (Cf. *Madsen v. Women's Health Center*, *supra*, 512 U.S. ____ [129 L.Ed.2d 593].)

In *Madsen*, which involved antiabortion demonstrators protesting outside a medical clinic that performed abortions, the trial

court found: "protesters continued to impede access to the clinic by congregating on the paved portion of the street . . . leading up to the clinic, and by marching in front of the clinic's driveways. It found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, 'sidewalk counselors' would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns. [¶] The protests, the court found, took their toll on the clinic's patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients 'manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures.' The noise produced by the protesters could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date, the doctor testified, increased their health risks by reason of the delay. [¶] Doctors and clinic workers, in turn, were not immune even in their homes. Petitioners picketed in front of clinic employees' residences; shouting at passersby; rang the doorbells of neighbors and provided literature identifying the particular clinic employee as a 'baby killer.' Occasionally, the protesters would confront minor children of clinic employees who were home alone. [¶] This and similar testimony led the state court to conclude that [an injunction was necessary] 'to protect the health, safety and rights of women . . . seeking access to [medical and counseling] services.'" (512 U.S. at pp. ____ [129 L.Ed.2d at pp. 603–604].) Accordingly, the trial court enjoined the protesters from engaging in a broad array of activities, including "'congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way . . . within [36] feet of the property line of the Clinic," and "'singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients

inside the Clinic [during specified hours]." (*Id.*, at pp. ____ [129 L.Ed.2d at pp. 604, 610, 612].) The Supreme Court upheld the 36-foot buffer zone around the clinic's entrances and driveway as a way of assuring access to the clinic, and approved limited noise restrictions to "ensure the health and well-being of the patients at the clinic." (*Id.*, at pp. ____ [129 L.Ed.2d at pp. 610-611, 612].)

Here, as did the antiabortion protesters in *Madsen*, defendants engaged in conduct which not only interfered with patients' access to the clinic to avail themselves of the constitutional right to an abortion (*Planned Parenthood v. Casey* (1992) 505 U.S. ____ [120 L.Ed.2d 674]), but also posed the threat of a significant level of harm to the patients. Akin to the medical evidence in *Madsen*, plaintiff's medical director, Dr. Steir, testified that an abortion is a procedure requiring a great deal of concentration. Because it is done with local anesthesia, the procedure requires the cooperation of the patient. Increased anxiety of patients, as well as staff, brought on by antiabortion activities increases the risks to the patient. Dr. Steir also described problems which could arise where a patient involved in a two-day procedure fails to return to the clinic on the second day. An abortion performed after 12 weeks of pregnancy is a 2-day procedure. On the first day a "Laminara" is inserted to dilate the cervix. The next day the actual operation is performed. According to Dr. Steir, life-threatening complications can result if the patient does not return after the first day.

Therefore, like the conduct in *Madsen*, defendant's actions constitute an adequate basis for injunctive relief despite the lack of violence or the threat of violence.

Defendants also contend a permanent injunction was inappropriate because no evidence was presented suggesting that the conduct supporting the temporary restraining order and preliminary injunction would be resumed if not permanently enjoined. In support of this claim, defendants point to the lack of evidence of prohibited conduct at the clinic for more than a year before trial.

Because injunction is an extraordinary remedy, the remedy should not be exercised unless it is reasonably probable the acts complained of will recur. "Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur. A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future." (*Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 190, citations omitted.)

Defendants claim the only evidence presented of their current activities and intentions was the testimony of Jay Baggett. Baggett indicated that, if not prohibited by the injunction, he would like to resume following patients as they approach the clinic, offering literature repeatedly despite being ignored, and telling patients they are making the wrong choice. Defendants argue this testimony does not establish what Baggett *would* do if not enjoined. They further argue Baggett actually ceased activities at the clinic because of escort conduct.

Regardless of whether Baggett's testimony established what he would do if permitted, it was reasonable for the trial court to conclude that the prohibited conduct would resume unless permanently enjoined. The subject of this dispute is so intensely divisive, and the antagonists so passionately committed to their respective positions, it is not reasonable to expect that activists on either side of the controversy would give up their convictions or cease their attempts to sway others. "Whether abortions should be legal is one of the most hotly contested issues of our day." (*Portland Fem. Women's H. Ctr. v. Advocates for Life* (9th Cir. 1988) 859 F.2d 681, 685.) The nature of the issue involved, plus the persistent and prolonged nature of defendants' activities at the clinic before issuance of the temporary restraining order and preliminary injunction, indicate such conduct was discontinued at least in part because of the legal prohibition. Compliance with a court order is not voluntary discontinuance of prohibited conduct. (*Phipps*

v. Saddleback Valley Unified School Dist. (1988) 204 Cal.App.3d 1110, 1118–1119.)

Even if antiabortion activities were discontinued in part because of escort conduct, this would not suggest that a permanent injunction is inappropriate. Escorts were not hired by the clinic until after the commencement of antiabortion activities. Their precise function was to assist patients in avoiding the harassing conduct of the demonstrators and to monitor compliance with the temporary restraining order and preliminary injunction. The decision whether to issue a permanent injunction should not turn on the continuation of such self-help efforts by the plaintiff.

IV

Defendants' primary challenge is to the breadth of the injunction. They contend that free speech activities cannot be excluded from the parking lot or sidewalk in front of the medical building. They further contend that use of a "speech free zone" burdens more speech than is necessary to serve the significant government interests enunciated by the trial court and that the absence of restrictions on escort conduct makes the injunction content specific.

We first address defendants' exclusion from the parking lot. This lot is of modest size and is posted for use only by tenants of the medical building and their clients.

The First Amendment to the United States Constitution and article I, section 2 of the California Constitution protect the right of free speech. The courts of this state repeatedly have protected the exercise of free speech rights in public places as well as on private property which has taken on the attributes of public property.

In *In re Hoffman* (1967) 67 Cal.2d 845, the court held that individuals cannot be prohibited from exercising free speech rights in a railway station which houses a restaurant, snack bar, cocktail lounge, and magazine stand and which is open to the general public. The court indicated: "[A] railway station is like a public street

or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests." (*Id.*, at p. 851.)

In *In re Lane* (1969) 71 Cal.2d 872, the court held that union picketers cannot be excluded from a private sidewalk leading to a "large 'super-market-type' grocery store." (*Id.*, at pp. 873, 876–877.) Due to a large parking lot surrounding the store, the only other available forum was the public sidewalk between 150 and 280 feet away from the store. The court explained: "[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment." (*Id.*, at p. 878.)

Despite subsequent United States Supreme Court decisions which have taken a more restricted view of First Amendment rights on private property (see *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131]; *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196]), the California Supreme Court has held by virtue of article I, section 2 of the California Constitution that free speech activities cannot be prohibited in a large private shopping mall (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899). According to the *Robins* court, such malls have supplanted central business districts as the essential public forum of a community. (*Id.*, at p. 910, fn. 5.) However, in so holding, the court emphasized the size of the mall (*id.*, at pp. 902, 910–911) and cautioned: " 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.' " (*Id.*, at p. 910.)

The present case does not involve either a shopping mall or a large retail establishment. In addition to the clinic, the medical

building houses only a few medical offices and a pharmacy. The parking lot in the rear of the building is restricted to tenants and their clients and visitors. The front of the building is less than 15 feet from the curb of the street.

In *Allred v. Shawley* (1991) 232 Cal.App.3d 1489, the court rejected a claim by abortion protesters that the parking lot of a 14,000 square foot office building with 10 tenants is a public forum. The building served mainly prearranged clients, was not fully open to the community, and did not provide services essential to all community members, such as would a mall or large grocery store. (*Id.*, at p. 1501.) In *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, where the court reached the same conclusion, the clinic location was described as follows: "The Medical Center's six tenants exclusively offer professional and personal services to specific clientele. It is for use only by individuals with specific business purposes, such as employees, clients and prospective clients of the tenants. The small off-street parking lot is designed to provide a convenient place to park for those having direct business with Medical Center tenants. Each parking spot is labeled for use by 'tenants' and 'patients,' and there is no space for public parking in general. Unlike a large shopping mall or historically recognized public forums like parks, streets or public sidewalks, the Medical Center in no way has acquired the attributes of a public forum." (*Id.*, at pp. 1671–1672.)

Defendants contend these cases are distinguishable because neither involved a facility housing a pharmacy open to the public. However, even though the pharmacy is open to the general public, we do not view this fact as changing the basic nature of the medical building as " 'a modest retail establishment' " (*Robins v. Pruneyard Shopping Center*, *supra*, 23 Cal.3d at p. 910), given the size of the building and parking lot involved. (Accord, *Sunnyside v. Lopez* (1988) 50 Wash. App. 786, 751 P.2d 313, 318.) The parking lot is private property, and the restriction against antiabortion activities therein is a reasonable limitation on defendants' free speech rights.

The injunction also prohibits antiabortion activities within a speech free zone, encompassing a large portion of the sidewalk in front of the medical building.[2] Such areas as streets, sidewalks and parks historically have been viewed as "quintessential public forums" where free speech cannot be prohibited. (*Perry Ed. Assn. v. Perry Local Ed. Assn.* (1983) 460 U.S. 37, 45 [74 L.Ed.2d 794, 804]; *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 244.) However, an injunction may restrict speech in such a forum if the injunctions's provisions are "content-neutral" and "burden no more speech than necessary to serve a significant government interest." (*Madsen v. Women's Health Center*, *supra*, 512 U.S. at p. ____ [129 L.Ed.2d at p. 608].)

Assuming the area designated a speech free zone is a public forum, we find the foregoing requirements satisfied in this instance. The trial court indicated the locational restriction on defendants' activity was not based on the content of their speech but on the conduct involved, i.e., the obstruction of ingress and egress by physical blocking and harassment, and on the risk of harm to the clinic's patients. This is supported by substantial evidence. A restriction against activities within a given area is content neutral, as it makes no reference to the issues or viewpoints raised. (*Madsen v. Women's Health Center*, *supra*, 512 U.S. at pp. ____ [129 L.Ed.2d at pp. 606, 607] ["the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"]; *Portland Fem Women's H. Ctr. v. Advocates for Life, Inc.*, *supra*, 859 F.2d at p. 686; *Bering v. Share* (1986) 106 Wash.2d 212, 721 P.2d 918, 925; but see *Thomason v. Jernigan* (E.D. Mich. 1991) 770 F.Supp. 1195, 1201.) The injunction simply insulates the clinic's patients from close physical contact with defendants, not from the content of their speech. (Cf. *Madsen*

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[2] The trial court expressly excluded from the speech free zone a three-foot wide strip adjacent to the curb along the side of J Street, i.e., what might be considered the "sidewalk" parallel to the front of the clinic. (See Webster's Third New International Dictionary (1971) p. 2113; The Random House Dictionary of the English Language (1966) p. 1324 [a sidewalk generally is defined as a walk along the side of a road or street].)

v. Women's Health Center, *supra*, at pp. ____ [129 L.Ed. 2d at pp. 610-611].)

Several significant government interests are served by exclusion from the speech free zone: the protection of the property rights of the clinic, the health and safety of the clinic's patients, and the privacy rights of the patients. (*Madsen v. Women's Health Center*, *supra* 512 U.S. at pp. ____ [129 L.Ed.2d at pp. 609-610].) "[T]he combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." (*Id.*, at p. ____ [129 L.Ed.2d at p. 610].)

Regarding the privacy rights of the patients, "[a]rticle I, section 1 of the California Constitution expressly makes the pursuit and obtaining of privacy an 'inalienable right.' The state right of privacy protects information about a citizen's participation in a medical procedure, including abortion." (*Chico Feminist Women's Health Center v. Scully*, *supra*, 208 Cal.App.3d at p. 241.) Aside from physically impeding access to the clinic, the presence of antiabortion activities directly in front of the clinic entrance can have a coercive effect on both patients and providers. Patients may be forced to seek assistance elsewhere or forgo the procedure altogether, while providers may be forced to discontinue abortion services because of continued harassment or pressure from building owners. In either event, the ability of a woman to effectuate her abortion decision would be compromised in violation of her rights.

Furthermore, fact-to-face confrontation between the protesters and the patients or staff members increases the health risks to patients. Evidence in this case established that the heightened level of anxiety engendered by such confrontations impairs the concentration of the doctors performing the abortions, increases the length of time necessary to perform the abortions, and increases the amount of medication needed by the patients. The physical hounding of the patients and staff by the protesters in the immediate proximity of the entrance to the clinic disrupts the atmosphere necessary for rendering safe and efficacious health care and increases the

risk of medical complications. The exclusion of defendants from the 20-foot zone provides the clinic's patients with a modicum of protection from defendants' harassing conduct, as well as ensuring access, without burdening more speech than is necessary to protect the aforementioned government interests. (*Madsen v. Women's Health Center*, *supra*, 512 U.S. at pp. ____ [129 L.Ed.2d at pp. 610-611] [a "36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake"]; cf. *International Society For Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. ____, ____ [120 L.Ed.2d 541, 553], ["face-to-face solicitation presents risks of duress that are an appropriate target of regulation"].)

Defendants are not prevented from speaking to patients who are in the speech free zone; defendants simply are precluded from entering the zone themselves. Moreover, defendants are not barred from the front of the building where the zone is located. A three-foot strip near the curb and parallel to the speech free zone is available for their use. Any patient approaching the clinic from the front would be required to go either directly past, or within a few feet of, defendants. "While the court could possibly achieve its goal with a narrower free zone, we decline to entertain quibbling over a few feet." (*Portland Fem. Women's H. Ctr. v. Advocates for Life*, *supra*, 859 F.2d at p. 686; cf. *Madsen v. Women's Health Center*, *supra*, 512 U.S. at pp. ____ [129 L.Ed.2d at pp. 610-611] [upholding a 36-foot buffer zone].)

Defendants have not been exiled to a nonaccessible location. As previously indicated, patients approaching the front of the clinic must pass areas where defendants are permitted. Those approaching the rear of the clinic through the parking lot must pass the lot entrance, where defendants also are permitted. Defendants are allowed to protest and carry signs in plain view of those entering or within the clinic, are not precluded from distributing their materials to anyone willing to accept them, and may approach patients on public property outside the 20-foot speech free zone so long as they do not assault the patients or attempt to block their access to

the clinic. The restriction merely prohibits defendants from getting in the way of someone trying to avoid a confrontation.

Defendants claim there is no evidence they obstructed access on the sidewalk. It follows, they argue, the speech free zone located there burdens more speech than is necessary to serve the government's interest in securing access. Their argument is unavailing.

First, there is substantial evidence that defendants, as well as other protesters, interfered with the sidewalk access to the clinic by means of physical obstruction as well as by the use of physical intimidation and harassment which served to constructively block access. Second, defendants overlook that the injunction is designed to preserve not only access to the clinic, but also to safeguard the health and safety of patients obtaining abortions. The 20-foot zone protects these patients from the defendants' anxiety-inducing physical confrontations, which increase the risk of medical complications. Contrary to defendants' assertion, the evidence established that the emotional distress suffered by patients resulted not from the content of the protesters' message, but from physical conduct of the protesters. The trial court approriately enjoined the defendants' presence within the 20-foot zone, but protected defendants' speech rights by carving out the parallel 3-foot zone on the sidewalk, within which defendants were free to speak to the patients, protest, picket and otherwise convey their message.

Defendants also assert that the injunction does not pass constitutional muster because the trial court did not first try a narrower injunction before creating a speech-free zone. We disagree. Although *Madsen v. Women's Health Center*, *supra*, states the previous ineffectiveness of a less restrictive injunction "may be taken into consideration" in evaluating the constitutionality of a broader order which includes a buffer zone (512 U.S. at p. ____ [129 L.Ed.2d at p. 611]), nothing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite. The failure of a less restrictive order is simply a factor which "may" be considered in determining whether a content-neutral injunction burdens

no more speech than necessary to accomplish a legitimate governmental interest. (*Ibid.*)[3]

Here, the 20-foot speech free zone, which is less restrictive than the buffer zone upheld in *Madsen v. Women's Health Center*, *supra*, was warranted in light of defendants' actions, including their violation of the temporary restraining order. The zone burdens the least speech necessary to protect access to the clinic and to reduce health risks to the patients by protecting the patients and medical staff from physical confrontations as they enter the clinic. The small size of the zone and defendants' ability to congregate in the parallel 3-foot strip ensures that anyone entering the clinic will hear the protesters' message and see any signs or pictures displayed by the demonstrators.

Lastly, defendants contend that creation of a speech free zone, in combination with the coercive conduct of clinic escorts, eliminates any reasonable alternatives for communication and, therefore is an unduly burdensome restriction on defendants' free speech rights. In support of this claim, defendants cite the testimony of Jay Baggett that escorts used such techniques as screening patients with umbrellas or signs, placing themselves between demonstrators and patients, taking prolife materials away from patients, using chants to drown out prolife messages, and intimidating demonstrators. However, much of this testimony conflicted with that of plaintiff's director of education, who indicated escorts were advised not to surround patients and were instructed to tell patients they could accept literature from antiabortion activists. It also conflicted with the testimony of plaintiff's escort coordinator who indicated she never tried to drown out antiabortionists or block them from patients. Implicit in the trial court's conclusion that reasonable alternatives were available is a finding that escort conduct did not interfere with these alternatives. This finding is supported by substantial evidence.

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[3] Defendants' reliance on *Pro-Choice Network v. Schenck* (2nd Cir. 1994) 34 F.3d 130 is misplaced because that opinion "was withdrawn from the bound volume pending a rehearing en banc poll." (34 F.3d 131-147.)

V

In a related argument, defendants contend the trial court erred in sustaining plaintiff's demurrers to the First Amendment claim in defendants' cross-complaint. They assert that the conduct of plaintiff's escorts violated defendants' right to disseminate antiabortion information and the patient's right to receive that information.

Free speech provisions of the state and federal constitutions protect citizens from restrictions imposed by governmental action. Free speech concerns may be raised as a shield against injunctive relief only because the effectuation of such relief entails government action. (Accord *Bering v. Share*, *supra*, 721 P.2d at p. 925.) However, the same concerns cannot be used as a sword to obtain relief against a private party. Thus, defendants' contention has no merit.

Furthermore, even assuming defendants have standing to assert free speech rights of clinic patients and could state a claim for their deprivation, the trial court implicitly found that escort conduct did not interfere with defendants' ability to communicate their message. Defendants do not suggest the dismissal of their First Amendment claim precluded admission of evidence of escort conduct. On the contrary, considerable testimony was received regarding such conduct.[4]

VI

Lastly, defendants challenge the award of attorney fees made pursuant to Code of Civil Procedure section 1021.5 (hereafter "section 1021.5"). They contend the award is not supported by the record and will have a chilling effect on their exercise of free speech rights protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.

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[4] We will not consider defendants' vague allusion to an Unruh Civil Rights Act violation (Civ. Code, § 51 et seq.) arising from use of the speech free zone. No such claim was raised in, or adjudicated by, the trial court.

Section 1021.5 codifies the "private attorney general" doctrine for awarding attorney fees. This doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.)

Where, as here, a plaintiff's action has not produced a monetary recovery, an award of attorney fees is proper under section 1021.5 if (1) the action has resulted in enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, and (3) the necessity and financial burden of private enforcement makes the award appropriate. (§ 1021.5; *Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at pp. 934-935.)

The trial court found these elements were met. Its determination may not be disturbed on appeal absent a showing that the court abused its discretion in awarding attorney fees, i.e., the record establishes there is no reasonable basis for the award. (*Westside Community For Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 645.) "The pertinent question is whether the grounds given by the court for its [grant] of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1298.)

Defendants do not dispute that this action resulted in the enforcement of an important right affecting the public interest and

that a significant benefit has been conferred on the general public or a large class of persons. (Cf. *Planned Parenthood v. Aakhus*, (1993) 14 Cal.App.4th 162, 170–172.) Moreover, they do not dispute the necessity of private enforcement. Rather, defendants contend the financial burden of private enforcement in this instance does not warrant an award of attorney fees.

The "financial burden" criterion of section 1021.5 is met "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' " (*County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89, quoted with approval in *Woodland Hills Residents Assn., Inc. v. City Council*, *supra*, 23 Cal.3d at p. 941.) This requirement "focuses not on [a plaintiff's] abstract personal stake, but on the financial incentives and burdens related to bringing suit. Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action." (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321, fn. 11.)

Defendants claim plaintiff had a sufficient financial interest in this litigation to preclude an award of attorney fees under section 1021.5. They argue the evidence "indicated that [plaintiff] took in $2.4 million from provision of medical services, most of which came from the Sacramento Clinic. . . . [¶] . . . Thus, the clinic receives a substantial benefit from funds collected for abortions. All the major [A]merican automakers have sustained recent losses, but their lawsuite [*sic*] are still brought and defended for financial reasons. The same rationale applied to plaintiff." The contention has no merit.

First, defendants overstate the financial benefit plaintiff receives from the medical services it provides.[5] The trial court found plaintiff's year-end surplus of revenues over liabilities for all of its clinics combined together amounted to only $11,914 in 1988, $15,000 in

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[5] The dissent also exaggerates this factor.

1989 and $30,353 in 1990. In other words, the financial burden of litigation exceeded plaintiff's net income for a three-year period. Moreover, plaintiff is a nonprofit corporation operating four medical clinics in northern California, and its surpluses are used to subsidize its failing clinics, not to provide dividends for shareholders.

Second, the record establishes that plaintiff's primary motive in pursuing this action was not to protect its personal financial interest, but was to ensure its ability to continue providing medical and abortion services to women. Plaintiff did not seek to recover lost revenues; it sought relief in a representative capacity on behalf of women attempting to obtain abortion services at its clinic. Because defendants' actions were directed at preventing women from obtaining abortions by obstructing them from getting out of their cars, by impeding their progress toward the clinic, and by blocking or otherwise interfering with the entrances to the clinic and the parking lot, plaintiff sought an injunction to protect its patient's right to abortion by ensuring that their access to abortion was not restricted unlawfully.[6]

Therefore, this is not a case of a litigant which is motivated solely by its own pecuniary interests and only coincidentally protects the public interest. (See *Angelheart v. City of Burbank* (1991) 232 Cal.App.3d 460, 470; *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114.) As stated in *Planned*

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[6] Claiming "the injunctive decree hardly represents a 'ringing declaration' of the right of women to an abortion" (dis. opn., *post*, p. 3), the dissent views the matter as nothing more than a business owner's enforcement of its right to the beneficial use of its business premises. Noting that defendant's activities threatened plaintiff's ability to meet its operating expenses, the dissent concludes plaintiff merely was defending its very existence. However, plaintiff was not defending its existence solely for a profit motive. Where an abortion provider is forced, directly or indirectly, to discontinue abortion services because of continued harassment, the ability of a woman to effectuate her abortion decision is compromised in violation of her rights. Without access to an abortion, the right to abortion is illusory. Plaintiff recognized this and explicitly sought injunctive relief to ensure that its patients had the continuing ability to obtain medical and abortion services.

Parenthood v. Aakhus, *supra*, a factually similar case which upheld an award of attorney fees under section 1021.5, "the interests of [plaintiff] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable. This action was brought to protect both [plaintiff] and its patrons; consequently, it cannot be exclusively characterized as a self-serving, private dispute commenced by [plaintiff] to protect its own pocketbook." (14 Cal.App.4th at p. 173.)

Because there is a reasonable basis in the record for the trial court's determination on the "financial burden" criterion, the court did not abuse its discretion in ordering defendants Jay Baggett, Don Blythe, Murray Lewis, Theresa Marie Reali, and John Stoos to pay plaintiff's attorney fees pursuant to section 1021.5.

There is no merit in these defendants' contention that the attorney fee award should not be assessed against them because they are private individuals. Their status as private parties does not preclude an award of attorney fees. (*Planned Parenthood v. Aakhus*, *supra*, 14 Cal.App.4th at p. 175; *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 349; *Braude v. Automobile Club of Southern Cal.* (1986) 178 Cal.App.3d 994, 1011; *Franzblau v. Monardo* (1980) 108 Cal.App.3d 522, 529-530.)

Defendants' claim that an award of attorney fees would operate to chill their rights to free speech also is unavailing because, as we shall explain, defendants' conduct unquestionably exceeded the protection afforded by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution, and interfered with the exercise by others of the constitutional right to abortion. (*Planned Parenthood v. Wilson*, *supra*, 234 Cal.App.3d at pp. 1670-1674; *Allred v. Shawley*, *supra*, 232 Cal.App.3d at pp. 1501-1505; see also *Planned Parenthood v. Aakhus*, *supra*, 14 Cal.App.4th at p. 175; *Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S.* (E.D. Cal. 1983) 557 F.Supp. 1190, 1202-1204.) "'[T]he First Amendment does not offer a sanctuary for violators. The same constitution that protects the

defendants' right to free speech, also protects [plaintiff's] right to abortion services and the patients' rights to receive those services.'" (*Northeast Women's Center, Inc. v. McMonagle* (3rd Cir. 1989) 868 F.2d 1342, 1349, citation omitted.)

As discussed previously, defendants obstructed access to the medical building and parking lot. "[B]locking access to public and private buildings has never been upheld as a proper method of communication in an orderly society." (*N.Y. State Nat. Organization for Women v. Terry* (2nd Cir. 1989) 886 F.2d 1339, 1364.) Defendants also attempted to prevent clients from getting out of their cars by standing in front of car doors. At other times, defendants would position themselves so that when a patient got out of her car she was pinned between her car and the adjacent vehicle. Once a patient was able to leave her vehicle, defendants' efforts to frustrate the patient's attempt to get to the clinic continued. After patients indicated a lack of interest in the demonstrators' views and expressed a wish to be left alone, defendants continued to thrust literature at them, yell at the patients, and even chase some of them down the sidewalk. On one occasion, defendant Baggett thrust a sign in a patient's face and would have hit her in the head if she had not moved out of the way. On another occasion, defendant Reali, who was inside the building, chased a tearful woman and thrust antiabortion literature at her. Furthermore, defendant Blythe assaulted escorts who were attempting to assist women in gaining access to the clinic.

Plaintiff sought the injunction due to this type of conduct. According to plaintiff's executive director and the clinic administrator, although the picketing had been going on for a year, court action was not pursued until defendants aggressively harassed women seeking abortion services and actually came into the building. After the temporary restraining order issued, and again after the preliminary injunction was granted, plaintiff attempted to settle this matter. Plaintiff offered to stipulate to making the injunction permanent so as to avoid the necessity and cost of trial and, in return, to modify the injunction to make it less objectionable to defendants. When

plaintiff's efforts were unsuccessful, the matter went to trial. The relief granted in the permanent injunction was not significantly different than that granted in the preliminary injunction, including the exclusion of defendants from the parking lot.

Consequently, the attorney fees incurred by plaintiff were necessitated by defendants' refusal to limit their conduct to that protected by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution. If defendants had not engaged in unprotected conduct, plaintiff would not have initiated this action and, thus, would not have incurred the attorney fees in question.

The attorney fee award does not operate to chill defendants' rights to freedom of speech because it does not prevent them from continuing to demonstrate and exercise their free speech rights within the lawful limits set forth in the injunction. No legitimate claim can be made that the attorney fee award punishes defendants after the fact for conduct they did not know was beyond the protected realm of their freedom of speech and, therefore, defendants and others will be inhibited in the future exercise of their freedom of speech for fear of being "penalized" again. Even the most naive person would have known defendants' conduct—obstructing access to a lawful enterprise and engaging in acts of assault and harassment to prevent women who had expressed disinterest in defendants' views from exercising the constitutional right to abortion—is not absolved by invoking the protections afforded by the First Amendment and article I, section 2. When a person oversteps the bounds of protected speech, civil and criminal liability may attach. (*Northeast Women's Center, Inc. v. McMonagle*, *supra*, 868 F.2d at pp. 1348-1350; cf. *Radiche v. Goode* (3rd Cir. 1989) 886 F.2d 1391, 1398.)

The dissent asserts the attorney fee award is infirm because the trial court "[did] not parse out the legal from the illegal conduct or fix the responsibility individually for illegal acts and the pro-

portionate impact of illegal conduct on plaintiff's litigation costs." (Dis. opn., *post*, at p. 12.)

However, defendants do not attack the attorney fee order on this basis. Moreover, *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886 [73 L.Ed.2d 1215], upon which the dissent relies, is inapposite. In that case, Black persons seeking to achieve racial justice were sued in state court for acting in concert to boycott a number of White merchants. The boycott generally was peaceful and orderly. No arrests were made and no complaints were received in connection with the defendants' picketing. However, some threats of violence and acts of violence were committed by some of the defendants against people not honoring the boycott. (*Id.*, at pp. 903-905 [73 L.Ed.2d at pp. 1229-1231].) Even though only some of the defendants had resorted to violence and unlawful conduct, the Mississippi Supreme Court concluded the entire boycott was unlawful and upheld the trial court's imposition of liability for the merchant's business losses on the ground the defendants maliciously interfered with the merchants' business. (*Id.*, at pp. 894, 895 [73 L.Ed.2d at p. 1224].) In addition, the defendants were enjoined from picketing the merchants' premises and from persuading people to withhold their patronage from the merchants' businesses. (*Id.*, at p. 893 [73 L.Ed.2d at p. 1224].) The United States Supreme Court reversed the judgment, holding the First Amendment protected the nonviolent elements of the boycott (*id.*, at pp. 915, 934 [73 L.Ed.2d at pp. 1237, 1249]), the state could not prohibit peaceful political activity (*id.*, at p. 913 [73 L.Ed.2d at p. 1236]), and the state court could not hold all the boycott participants liable for all the merchants' damages merely because some of the participants engaged in violence, especially where it was not established that all of the damages were attributable to the unprotected, violent activity (*id.*, at pp. 921-923 [73 L.Ed.2d at pp. 1241-1242]). The court stated: "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." (*Id.*, at p. 918 [73 L.Ed.2d at p. 1240].) Hence,

only those defendants who engaged in unprotected, violent conduct were responsible for the damages and only to the extent the damages were caused by their unlawful conduct. (*Id.*, at pp. 926, 933 [73 L.Ed.2d at p. 1244, 1249].)

Here, unlike in *NAACP v. Claiborne Hardware Co.*, *supra*, plaintiff commenced this action to enjoin defendants' unlawful and unprotected conduct, the injunction granted was proper, and all of the defendants engaged in the unprotected activities which caused plaintiff to seek the injunction. Because plaintiff was compelled to retain counsel to secure an order enjoining *unprotected conduct engaged in by all of the defendants*, it is proper to hold all of them accountable for plaintiff's attorney fees.[7]

The dissent offers yet another basis, not advanced by defendants, to overturn the attorney fee award. Stating that union members picketing their employers' businesses frequently have been enjoined from related conduct which unduly infringes on the employers' property rights, the dissent suggests there are no cases which have required individual union members to pay attorney fees incurred by the businesses in obtaining the injunctions. Implying there are no such cases because the picketers were exercis-

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[7] We recognize that a trial court has discretion to apportion a section 1021.5 attorney fee award based upon the relative culpability of the defendants. (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 976; *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, 592-593; *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 272.) However, in this case the trial court was not asked to apportion the attorney fee award among the defendants. Accordingly, it cannot be said the trial court abused its discretion by failing to order an apportionment. Moreover, plaintiff theorized that defendants were "acting in concert" with the other demonstrators in a concerted effort to obstruct patient access to plaintiff's abortion services. There is evidence to support such an inference. For example, evidence suggested that defendants Baggett, Blythe and Lewis exercised leadership roles in the demonstrations and that Baggett, Blythe, Lewis and Stoos welcomed the assistance of Operation Rescue. By ruling the defendants are jointly and severally liable for the attorney fee award, the trial court appears to have concluded that they were equally culpable of the unprotected conduct which gave rise to the attorney fee award and that none of them engaged in a lesser role which would have justified apportionment of the fee award.

ing their First Amendment rights, the dissent asserts, by analogy, that attorney fees should not be awarded in the present case. (Dis. opn., *post*, at pp. 7–8.) We are unpersuaded. Ordinarily, attorney fees pursuant to Code of Civil Procedure section 1021.5 would not be warranted in an action to enjoin certain conduct of union members picketing their employer's business, even if the picketers' conduct included actions unprotected by the First Amendment. This is so because (1) injunctions obtained by employers do not necessarily confer a significant benefit upon the general public or a large class of persons, and (2) if employers champion only their individual property rights, the financial burden of litigation would not outweigh their personal stake in the matter. Hence, the analogy invoked by the dissent is inapposite.

In their reply brief, defendants argue the attorney fee award should be reversed due to the fact that some of the litigation expenses were incurred by plaintiff's seeking an impermissible line of sight restriction and because defendants believed they had a constitutional right to conduct their activities in the parking lot and on the sidewalk. Defendants note that *Allred v. Shawley*, *supra*, 232 Cal.App.3d 1489 and *Planned Parenthood v. Wilson*, *supra*, 234 Cal.App.3d 1662, which held that parking lots similar to plaintiff's are not public or quasi-public forums, were not decided until after the trial in this case was completed. Thus, according to defendants, their "options were to be intimidated by fear of attorneys [*sic*] fees into abandoning what were, at the time, established constitutional rights, and stipulating to a line of sight restriction, or to risk losing their life savings."

Generally, points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Defendants have failed to establish good cause for their omission. In any event, defendants' contention is unpersuasive for two reasons.

First, the activities engaged in by defendants were not "at the time, established constitutional rights." Defendants cite no cases holding that private property similar to plaintiff's parking lot is a public forum which must be made available for the exercise of free speech rights. This is understandable because pertinent cases indicate the contrary. The First Amendment to the United States Constitution does not give individuals an unqualified right to engage in free expression and assembly on private property. (*Lloyd Corp. v. Tanner*, *supra*, 407 U.S. at pp. 567-570, [33 L.Ed.2d at pp. 142-143]; *Hudgens v. NLRB*, *supra*, 424 U.S. at pp. 516-521 [47 L.Ed.2d at pp. 204-207].) Under limited circumstances, people are entitled to exercise First Amendment rights on private property which has assumed all of the characteristics of a municipality and has been devoted sufficiently to public use, a circumstance which plainly is not present in this case. (*Ibid.*; *Marsh v. Alabama* (1946) 326 U.S. 501, 506-507 [90 L.Ed. 265, 268-269].) The California Constitution is more definitive and inclusive than the First Amendment in protecting expression. (*Robins v. Pruneyard Shopping Center*, *supra*, 23 Cal.3d at pp. 908-909.) As noted in part IV, *ante*, *Robins v. Pruneyard Shopping Center*, *supra*, held that California's Constitution independently protects speech and petitioning rights reasonably exercised in large, privately owned shopping centers because such malls have supplanted central business districts as essential public forums of a community. (*Id.*, at 910, fn. 5.) However, the court emphasized the size of the mall (*id.*, at pp. 902, 910-911) and cautioned: "'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.'" (*Id.*, at p. 910, citation omitted.) In other words, *Robins v. Pruneyard Shopping Center*, *supra*, did not hold that a parking lot that is adjacent to a small medical building and has signs posted restricting its use to tenants and clients is a public forum. In fact, the decision intimated that such a modest establishment is *not* a public forum.

Accordingly, at the time of the demonstrations, there was no case law which would have led defendants to believe they had a constitutional right to ignore the signs posted on plaintiff's parking lot—warning that the parking lot was reserved for use of tenants and customers and that trespassers would be prosecuted—and to enter onto the parking lot in an effort to convey their antiabortion message.

Moreover, even if they honestly thought the parking lot was a quasi-public forum, defendants had absolutely no basis to believe they had a constitutional right to enter the lot to interfere with the conduct of plaintiff's business and use of the property, to impede the movement of customers or business tenants, to block access, to create noisy disturbances or to harass uninterested patrons. (*In re Hoffman*, *supra*, 67 Cal.2d at pp. 851–852.)

Second, the fact that plaintiff did not prevail in its attempt to increase the speech free zone to an area within the line of sight of the front and rear entrances to the medical building does not undermine the attorney fee award. Despite defendants' request that the trial court reduce the attorney fee award based upon plaintiff's failure to prevail on the so-called "line of sight" restriction, the trial court declined to do so. We find no abuse of discretion. (*Sundance v. Municipal Court*, *supra*, 192 Cal.App.3d at p. 274.) The record discloses plaintiff did not avidly pursue a line of sight restriction. In fact, plaintiff indicated it readily would accept a 20-foot speech free zone. In its trial brief, plaintiff even suggested the court "put the picketers where the women can see them and voluntarily approach them if interested (away from the front of the building)." Under the circumstances, the trial court reasonably could have concluded that an insignificant portion of plaintiff's attorney fees were expended in litigating a line of sight restriction.

A reduced fee award is appropriate when a claimant achieves only limited success. (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249.) Here, plaintiff got virtually all it asked for.

Hence, the trial court did not err in awarding plaintiff full compensation for its attorney fees.[8]

Although we shall affirm the order as to defendants Baggett, Blythe, Lewis, Reali, and Stoos, we will reverse the attorney fee award as to defendants John Walker and Operation Rescue. They contend correctly that they may not be held liable for plaintiff's attorney fees because an award of such fees is precluded by Code of Civil Procedure section 580.

Walker and Operation Rescue did not file answers to plaintiff's complaint, and defaults were entered accordingly. Code of Civil Procedure section 580 provides: "*The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint*; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." (Italics added.)

Code of Civil Procedure section 580 repeatedly has been interpreted in accordance with its plain language. A trial court has no jurisdiction to grant a plaintiff more relief against a defaulting de-

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[8] Although not controlling, federal precedent is of analogous precedential value. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639, fn. 29; *Sokolow v. County of San Mateo*, *supra*, 213 Cal.App.3d at p. 249.) According to the United States Supreme Court, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . .[¶] If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . [T]he most critical factor is the degree of success obtained." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 435–436 [76 L.Ed.2d 40, 52].) The trial court has discretion in determining the amount of a fee award. (*Id.*, at p. 437 [76 L.Ed.2d at p. 53].) As we have indicated, because plaintiff obtained "excellent results" in that it obtained the vast majority of the relief requested in its complaint, the trial court did not abuse its discretion in awarding full compensation.

fendant than is asked for in the complaint. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166-1167; *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493.)

Plaintiff's complaint does not contain any allegations concerning attorney fees, nor does it demand such fees. If plaintiff believed it was entitled by statute to attorney fees, it had to allege that fact in its complaint and demand the fees in the prayer in order to obtain such relief against any defaulting defendants. (*Becker v. S.P.V. Construction Co.*, *supra*, 27 Cal.3d at p. 495; *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474.) It also is noteworthy that plaintiff failed to request attorney fees as costs in its requests to enter default. (*Wiley v. Rhodes, supra*, at p. 1474, fn. 5.)

Plaintiff contends the award was proper because a request for attorney fees under section 1021.5 need not be made until after the judgment is final. Ordinarily, this is true. (*Stebbins v. Gonzales* (1992) 3 Cal.App.4th 1138, 1146; *Angelheart v. City of Burbank*, *supra*, 232 Cal.App.3d at p. 466; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 226-227; see also *Washburn v. City of Berkeley*, *supra*, 195 Cal.App.3d at p. 583.) However, the aforesaid cases do not involve defendants against whom defaults were entered. Hence, those cases are governed by the latter half of Code of Civil Procedure section 580, which provides that in any case where an answer has been filed "the Court may grant [the plaintiff] any relief consistent with the case made by the complaint and embraced within the issue."

Plaintiff has cited no cases holding that an award of attorney fees under section 1021.5 is proper against a defaulting defendant where a demand for such fees was not included in the complaint, and our research has disclosed none. Accordingly, plaintiff is constrained by the plain and unambiguous mandate of Code of Civil Procedure section 580: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; . . ."

Because plaintiff did not demand attorney fees in its complaint, the court did not have jurisdiction to award such fees against defendants Walker and Operation Rescue. In light of this conclusion, it is unnecessary to consider the additional challenges raised by Walker and Operation Rescue, i.e., that attorney fees may not be awarded because the judgment did not grant plaintiff any relief against them, or that they may not be held liable for fees incurred after their defaults were entered. In addition, we need not address Operation Rescue's challenge to service of process as a basis for reversing the attorney fee award as to Operation Rescue.

DISPOSITION

The attorney fee order is reversed as to defendants Walker and Operation Rescue. In all other respects, the judgment and attorney fee order are affirmed. Defendants Blythe, Lewis, Reali, Baggett and Stoos shall pay plaintiff's costs on appeal. Plaintiff shall pay the costs on appeal of defendants Walker and Operation Rescue.

SCOTLAND, J.

I concur:

RAYE, J.

I concur in the opinion of the court to the extent it affirms the judgment granting plaintiff a permanent injunction and reverses the order awarding plaintiff attorney fees as against defendants John Walker and Operation Rescue. I dissent from the affirmance of the trial court's order awarding plaintiff attorney fees against the answering defendants.

Defendants attack the order for attorney fees on two grounds: (1) plaintiff failed to establish the financial burden of private enforcement is disproportionately greater than its stake in the litigation and (2) the award of attorney fees in these circumstances unconstitutionally burdens defendants' rights of free speech. I agree the order is infirm on both grounds.

I

Code of Civil Procedure section 1021.5 permits the award of attorney fees to a successful party in any action resulting in "the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Defendants contend the plaintiff failed to establish that the financial burden of private enforcement warrants an award of attorney fees. I agree. Despite being a nonprofit organization, plaintiff's operations are significant, with four clinics in Northern California. In 1990, plaintiff had a budget of $2.4 million. Plaintiff receives its operating income from fundraising and fees for services rendered, with the greater portion coming from the latter. Fees range anywhere from $10 for minor services to $295 for an abortion. In 1988 plaintiff received $1,427,746 in fees. In 1989 the amount was $1,865,440 and in 1990 it was $2,346,891.

In 1988 the clinic saw 2,500 patients. This number grew to 3,500 in 1989, and to 6,000 in 1990. Of the 6,000 patients seen

in 1990, 2,500 to 3,000 had abortions performed. Due to the conduct of picketers, attendance of patients at the clinic on Saturdays dropped by as much as 50 percent. According to Shauna Heckert, the clinic's administrator, patients "would want to change to a different facility." Because a substantial number of patients who needed the clinic's services obtained them elsewhere, plaintiff asserts the picketing caused it "a tremendous financial loss."

"The financial burden of private enforcement requirement means that an award of attorney fees under section 1021.5 . . . is only appropriate when the cost of the claimant's legal victory transcends his or her personal interest—i.e., when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter. [Citation.]" (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 30.)

Plaintiff was defending its very existence as a fee for service entity. As plaintiff's customers fell off because of defendants' activities, plaintiff's ability to meet operating expenses was threatened. Given the size of plaintiff's operations and its annual revenue, a $99,000 legal bill is not out of proportion to plaintiff's stake in the litigation.

Although the relief granted vindicated plaintiff's interest in the controversy, the injunctive decree hardly represents a "ringing declaration" of the right of women to an abortion. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 167.) The decree simply insures undisturbed access to plaintiff's facility of fee paying customers who choose to patronize plaintiff's clinic rather than some other similar facility. Its effect is no different than an injunction against union members picketing their employer's business in a labor dispute. In such cases, the injunction allows the employer to continue the beneficial use of its business premises. The fact that the injunction also frequently enables non-striking employees who are strangers to the litigation to resume the pursuit of their livelihoods is simply an incidental effect.

The claimant bears the burden of establishing its litigation costs are out of proportion to its personal stake in the matter. (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.) Plaintiff did not meet this burden.

II

Defendants renew their trial court contention that the attorney fees award chills the exercise of their First Amendment rights. Again, I agree.

"[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' *Carey v. Brown*, 447 U.S. 455, 467, 65 L.Ed.2d 263, 100 S.Ct. 2286. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 65, 74–75, 13 L.Ed.2d 125, 85 S.Ct. 209. There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412." Thus spoke the United States Supreme Court in *NAACP v. Claiborne Hardware Co.* (1982) 485 U.S. 886, 913 [73 L.Ed.2d 1215, 1236].

In their activities at plaintiff's abortion clinic, defendants expressed their views on a national controversy that has deeply divided the country. To say that the manner of expression was robust and uninhibited understates the case. Indeed, it was strident, accusatory and confrontational. "Strong and effective extemporaneous rhetoric cannot be channeled in purely dulcet phrases." (*NAACP v. Claiborne Hardware Co.*, *supra*, 485 U.S. at p. 928 [73 L.Ed.2d at p. 1246].) Nevertheless, the defendants' message was well within the bounds of constitutionally protected speech. For example, defendants shouted "murder, murder, murder," at women entering the clinic, and implored them not to "kill" their babies. Representative of the messages on the signs and posters displayed by defendants were these: "Abortion Kills Babies, Stop the Holocaust"; "Abortion, the Ultimate Child Abuse"; "Dr. Bruce

Steir Butchers Babies Here"; "[Shauna] Heckert's Baby Hackery"; "Abortion, An Act of Raw Power."[1]

Defendants, or at least some of them, also engaged in activities that are not constitutionally protected or otherwise privileged. For example they at times blocked ingress to the building and the parking lot and impeded patients and others attempting to approach and enter the clinic. But it grossly distorts the record to suggest that defendants' activities involved a continuous, unbroken series of illegal acts unrelieved by the pristine exercise of free expression. In fact, it is the latter, constitutionally protected activity that predominated and thus more accurately characterizes defendants' activities.[2]

By their conduct, defendants demonstrated their passionate devotion to what is commonly known as the pro-life cause. While I do not condone the unlawful excesses by which defendants' fervor sometimes manifested itself, I do not doubt that defendants' un-

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[1] The latter message appears to be a send-up of Justice White's dissent in *Roe v. Wade* (1973) 410 U.S. 113 [35 L.Ed.2d 147]. Justice White excoriated the *Roe v. Wade* majority for its "exercise of raw judicial power" in "fashion[ing] and announc[ing] a new constitutional right for pregnant mothers" without support "in the language or history of the constitution." (*Roe v. Wade*, *supra*, 410 U.S. at 222–223 [35 L.Ed.2d at 195–196; dis. opn. of White, J.].)

[2] Perpetrators of violence can claim no sanctuary in the First Amendment no matter how pure or well intentioned their motives or their message. While there is evidence of physical contact between some of the defendants and some of plaintiff's employees and patients, it was confined to bumping, shoving and blocking and, as the trial court found, was engaged in by partisans on both sides of this controversy. Defendants had no right forcibly to commandeer an audience to hear their message nor to impede access to plaintiff's clinic, and plaintiff and its agents had no right forcibly to interfere with defendants' attempts peacefully to communicate. By enjoining defendants from conducting their activities in specified areas adjacent to the clinic, the trial court sought to foreclose any repetition of this conduct. While I do not condone this conduct in any circumstances, given the numbers of persons involved and the period of months in which the protest activities took place, the incidence of, and level of force used in such physical encounters hardly justify the extravagant characterization of defendants' activities as "violent."

derlying purpose was to protest activity which, according to their understanding, was violative of natural law, even though that activity has been expressly sanctioned by the highest judicial tribunal in the land. That is political speech pure and simple, and when lawfully expressed, is entitled to constitutional protection.

Speech and conduct cannot neatly be separated. Indeed, it is difficult to imagine how speech can be an effective vehicle for communication of ideas unaided by conduct of some kind. The precise line between conduct protected as a necessary adjunct to free expression and conduct which cannot claim that protection is not a bright one. It can be ascertained only by a delicate balancing of the competing rights at stake in concrete factual circumstances.

Because defendants' exercise of free expression collided with plaintiff's right to engage in lawful activity on its property, defendants' freedom of expression could be restricted. Defendants were enjoined from conduct which directly interfered with plaintiff's conduct of lawful activity on its business premises. On the other hand, recognizing the constitutional sanctity of free expression, the court rejected plaintiff's demand that defendants be precluded from demonstrating in the immediate vicinity of the clinic, i.e., at any location in which their activities could be observed from within the clinic.

Viewed in the historical context of First Amendment litigation, there is nothing particularly remarkable about this dispute or its resolution by the trial court. The exercise of free expression through demonstrations and picketing has a venerable history in the political life of our democracy and has played a vital role in influencing public policy. Yet on countless occasions courts have been called upon to rein in demonstrators and picketers whose passion and exuberance in furtherance of their causes has trenched upon the rights of others to engage in lawful activities. For example, union members who broadcast their views in a labor dispute by picketing their employer's business frequently have been enjoined from conduct that unduly infringes upon the employer's property rights.

And, as in this case, such conduct has often had the incidental effect of interfering with the constitutional rights of third parties. Thus in labor union-employer disputes, picketers frequently prevent nonstriking employees from pursuing their livelihoods. (See *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 [67 L.Ed. 1042, 1045] cited with approval in *Planned Parenthood v. Casey* (1992) 505 U.S. _____ [120 L.Ed.2d 674, 696]. If in those injunction proceedings individual union members (as distinct from the union itself) have been held personally liable for the employer's attorney fees it has escaped my notice and I would be astounded if it were to be allowed.[3]

In *NAACP v. Claiborne Hardware Co.*, *supra*, the defendants, Black persons seeking to achieve racial justice, were sued in state

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[3] Unlike abortion rights, property rights and free speech rights enjoy express protection from government infringement in the federal Constitution. Property rights are protected expressly by Amendments V & XIV and implicitly by Amendments II, III and IV. Free speech rights are protected expressly by Amendment I. In contrast, the constitutional right to an abortion derives either from "penumbras formed by emanations from" the specific guarantees of the Bill of Rights (*Griswold v. Connecticut* (1965) 381 U.S. 479, 484 [14 L.Ed.2d 510, 514]; *Roe v. Wade*, *supra*, 410 U.S. at pp. 152-153 [35 L.Ed.2d at pp. 176-177]) or is subsumed within the "heart of [the] liberty [interest] protected by the Fourteenth Amendment," an interest which, we are told, particularly protects the right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (*Planned Parenthood v. Casey* (1992) 505 U.S. _____ [120 L.Ed.2d 674, 698].) In time, perhaps, a less vaporous constitutional theory for abortion rights may be divined by jurists even more adept at creative construction, but we must accept the existing handiwork of our judicial betters, unconvincing though it may be. In any event, whatever may be the constitutional provenance of the right to an abortion, the right is not superior to other constitutionally protected rights such as free speech, property rights and the fundamental right to pursue one's livelihood which is also protected as a function of substantive due process (see *Meyer v. Nebraska*, *supra*, 262 U.S. 390 [67 L.Ed. 1042]). The notion implicit in the canon of many supporters of abortion rights that the right to an abortion trumps all other constitutional rights is simply a faddish conceit. In this case, of course, plaintiff does not contend that government is unconstitutionally trenching on its property rights or on the rights of plaintiff's clients to an abortion. However, defendants do contend government is infringing upon their protected free speech rights by virtue of the judgment against them for plaintiff's attorney fees.

court for acting in concert to boycott a number of White merchants. The boycott was marred by a number of illegal acts. The United States Supreme Court characterized it as "chameleon-like . . . includ[ing] elements of criminality and elements of majesty." (485 U.S. at p. 888 [73 L.Ed.2d at 1221].) The Supreme Court reversed a joint and several judgment against defendants and in favor of the White merchants for injunctive relief and damages for business losses due to the boycott plus attorney fees. The court held the nonviolent activities of defendants are entitled to First Amendment protection. (485 U.S. at p. 915 [73 L.Ed.2d at 1237].) "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately cause by unlawful conduct may be recovered." (485 U.S. at p. 918 [73 L.Ed.2d at p. 1240].) "'In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 [5 L.Ed.2d 231, 81 S.Ct. 247] (1960).' *Carroll v. Princess Anne*, 393 U.S. 175, 183–184, 21 L.Ed.2d 325, 89 S.Ct. 347." (485 U.S. at p. 920 [73 L.Ed.2d at 1241].)

The court explained: "At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, [defendants'] ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

"The taint of violence colored the conduct of some of the [defendants]. They, of course, may be held liable for the consequences of their violent deeds. *The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the*

boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the [state trial judge] . . . are constitutionally insufficient to support the judgment that [defendants] are liable for all losses resulting from the boycott." (485 U.S. at 933, 934 [73 L.Ed.2d at p. 1249], italics added.)

In respect to the joint and several judgment against defendants for plaintiff's attorney fees, the facts here are closely analogous to those in *Claiborne*. A monetary award for attorney fees has no less a chilling effect on the exercise of First Amendment rights than if the award were denominated one for compensatory damages. Such a distinction would be utterly sophistical. The exaction of money from defendants will burden them with the same baleful economic consequences no matter the label on the judgment. Moreover, notwithstanding the illegal acts of some of the defendants some of the time, defendants' primary purpose was to communicate their views on a highly controversial issue of great public interest and concern. Most of defendants' activities in furtherance of that purpose were lawful and thus constitutionally protected. The trial court's findings do not parse out the legal from the illegal conduct or fix the responsibility individually for illegal acts and the proportionate impact of illegal conduct on plaintiff's

litigation costs.[4] Conversely, the trial court made no finding on the extent to which plaintiff's litigation costs were increased by the unsuccessful effort to limit defendants' picketing activities to areas further removed from the clinic, relief which the trial court refused presumably because it would be an unreasonable restriction on defendants' constitutionally protected rights of free expression. The record simply will not support a monetary judgment against defendants the inevitable consequence of which will be to stifle the exercise of First Amendment rights not only by defendants but by all others who in the future will forswear their rights because they cannot afford financial penalties much less financial ruin as the price of exercising constitutionally guaranteed rights.[5]

By "constitutionalizing" the right to abortion the highest court in the land has preempted any policy making role by the political branches of government in respect to abortion. Citizens dissatisfied with public policy governing abortion can no longer look to their legislators for change. But the high court did not *and could not* foreclose further political debate on the subject. This is, after all, the United States of America, not the "Evil Empire." What the high court did do, however, is to constitute the streets the primary, if not the only, forum for that debate. Debate in the forum of the streets lacks the orderliness and civility of the legislative forum to which citizens could otherwise repair to influence public pol-

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[4] The majority implies defendants have waived any claim the trial court erred in failing to distinguish between constitutionally protected and unprotected conduct in assessing attorney fees. (See, e.g., maj. opn., *ante*, fn. 7 at pp. 45–46.) From the outset defendants have maintained that fixing them with liability for attorney fees would chill their rights of free speech because their conduct was constitutionally protected. It is clear from the record that a good deal of their conduct was constitutionally protected and the fact that, contrary to defendants' contention, some was not hardly operates to forfeit their claim to constitutional protection in its entirety.

[5] In opposition to plaintiff's request for attorney fees, defendants filed declarations of their financial status showing that they are people of very modest resources. In responding points and authorities plaintiff airily dismissed these declarations as "verbal garbage." Defendants' declarations stand uncontradicted.

icy. Street debaters are not governed by Robert's Rules of Order. Given these realities, we should not be "slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which [its guarantees] might be stifled." (*NAACP v. Claiborne Hardware Co.*, *supra*, 485 U.S. at p. 932 [73 L.Ed.2d at p. 1248].)

I would reverse the judgment for attorney fees in its entirety.

Puglia, P.J.

APPENDIX B

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

Case No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, MURRAY LEWIS, JOHN WALKER, TERRI DOE, THERESA MARIE REALF, JOHN STOOS, JOHN ANTHONY, STEVE DOE, and DOES 1 through 50,

Defendants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

[Filed Jan. 6, 1989]

On reading the Complaint of plaintiff Feminist Women's Health Center on file in the above-entitled action and the Declarations of Shauna Heckert and Eileen Schnitger, and the Memorandum of Points and Authorities submitted, it appears to the satisfaction of the court that this is a proper case for granting an Order to Show Cause and a Temporary Restraining Order. Unless the Temporary Restraining Order prayed for in the Complaint is granted, great or irreparable injury will result to the plaintiff before the matter can be heard on notice.

IT IS HEREBY ORDERED that the above-named defendants, and each of them, appear in Department 27 of this Court, located at 800 H Street, Sacramento, California, on January 23, 1989, at 9:00 a.m. to show cause, if they have any, and why, they, and each of them and their agents, servants, employees and representatives, should not be enjoined and restrained during the pendency of this action from engaging in, committing or performing, directly or indirectly, any and all of the following acts:

1. Trespassing on the private parking lot which adjoins the back entrance of the Center Building at 3701 J Street, Suite 207;

2. Standing in the street at the entrance to the parking lot which adjoins the Center premises (I Street);

3. Blocking the front entrance of the medical building at 3701 J Street, from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone thirty (30) feet wide on each side of the doorway of the front entrance of the medical building at 3701 J Street, in Sacramento, California;

4. Following clients or patients entering or leaving the Health Center or approaching within fifteen (15) feet of their cars without having been invited;

5. Shouting or using any voice amplification devices for the purposes of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Suite 207;

6. Accosting, addressing, or offering literature to any employee, agent, client, visitor, or business invitee of plaintiff who has already refused such offer or address;

7. Standing in or stepping in the path or right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California;

8. Photographing or videotaping persons approaching, entering or leaving the premises;

9. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises.

IT IS FURTHER ORDERED, pending the hearing on this matter on January 23, that the above-named defendants and each of them and their agents, servants, employees and representatives, are enjoined and restrained from:

1. Entering on the private parking lot which adjoins the back entrance of the Center building at 3701 J Street, Suite 207, between the hours of 8:00 a.m to 5:00 p.m. Saturdays;

2. Standing in the street at the entrance to the parking lot which adjoins the Center premises (I Street), so as to interfere with autos entering the lot;

3. Blocking the front entrance of the medical building at 3701 J Street, from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone fifteen (15) feet wide on each side of the doorway of the front entrance of the medical building at 3701 J Street, in Sacramento, California, from the doorway to the curb (see attached drawing labeled Exhibit A).

4. Following within ten (10) feet of clients or patients leaving the Health Center or approaching within ten (10) feet of their cars without having been invited;

5. Using any voice amplification devices for the purpose of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Suite 207;

6. Accosting, addressing, or offering literature to any employee, agent, client, visitor, or business invitee of plaintiff who has already refused such offer or address;

7. Blocking the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California, from 8:00 a.m to 5:00 p.m.;

8. Photographing or videotaping persons approaching, entering or leaving the premises;

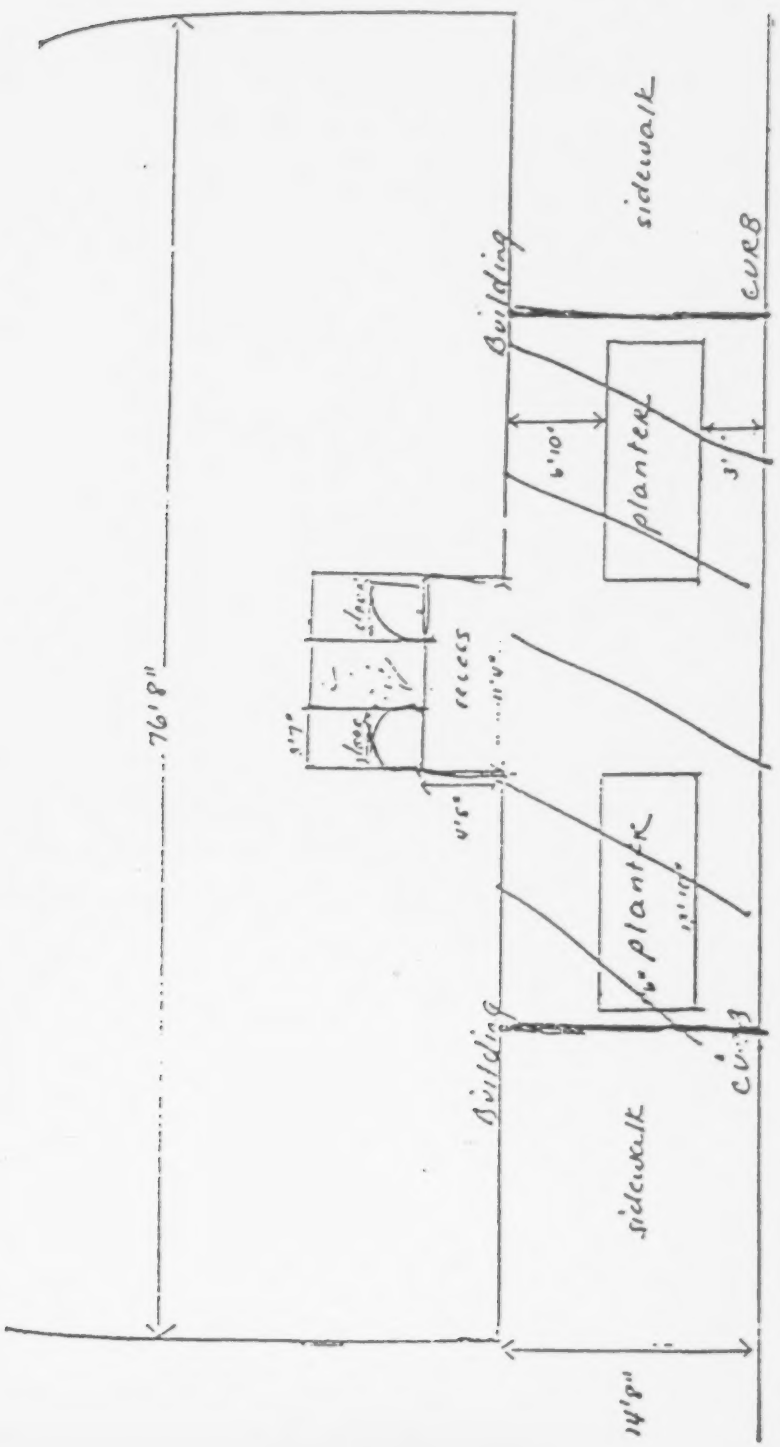
9. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises.

DATED: January 6, 1989.

SO ORDERED:

/s/ [Illegible]
Judge of the Superior Court

EXHIBIT A



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APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

Case No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, *et al.*

Defendants.

AMENDED TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

[Filed Jan. 13, 1989]

IT IS HEREBY ORDERED that the attached TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION is modified in the following respects:

1) The parties, through counsel, are ordered to appear in Department 27 of this Court, located at 800-H Street, Sacramento, California, on January 17, at 3:00 p.m. to consider defendants application for an Order vacating temporary restraining order, copies of which are to be served on plaintiff's counsel prior to that time.

2) Paragraph 1 of the attached Order, located on page 3 thereof, is deleted.

3) Page 3, line 23, of the attached Order is amended by substituting the phrase "ten (10)" for the phrase "fifteen (15)".

3) Paragraph 3, page 3 of the attached Order is modified to include the following proviso: defendants may hand written information to any person who requests it after being offered it.

4) Paragraph 4, page 4 of the attached Order is modified to include the following proviso: defendants may hand written information to any person who requests it after being offered it.

The attached Order shall otherwise remain in effect as written.

DATED: January 13, 1989

/s/ [illegible]
Judge of the Superior Court

APPENDIX D

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

Case No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, MURRAY LEWIS, JOHN WALKER, TERRI DOE, THERESA MARIE REALF, JOHN STOOS, JOHN ANTHONY, STEVE DOE, and DOES 1 through 50,

Defendants.

FURTHER AMENDED TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

[Endorsed Jan. 24, 1989]

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

This matter came on for Hearing on January 23, 1989, in Department 27 of the above-entitled court at which time the court heard oral argument on plaintiff's and respondents' cross-motions for modification of a Temporary Restraining Order issued by this court on January 6, 1989 and subsequently amended on January 13, 1989.

After considering the Points and Authorities submitted by the parties and the arguments of counsel the court further amended the Temporary Restraining Order to read as follows:

IT IS HEREBY ORDERED that the above-named defendants, and each of them, appear in Department 28 of this court, located at 800-H Street, Sacramento, California, on February 27, 1989, at 9:00 a.m., to show cause, if they have any, and why they and each of them and their agents, servants, employees and representatives, should not be enjoined and restrained during the pendancy of this action from engaging in, committing or performing, directly or indirectly, any and all of the following acts:

1. Trespassing of the private parking lot which adjoins the back entrance of the Center Building at 3701 J Street, Suite 207;

2. Standing in the street at the entrance to the parking lot which adjoins the Center premises (I Street);

3. Blocking the front entrance of the medical building at 3701 J Street, from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone thirty (30) feet wide on each side of the doorway of the front entrance of the medical building at 3701 J Street, in Sacramento, California;

4. Following clients or patients entering or leaving the Health Center or approaching within fifteen (15) feet of their cars without having been invited;

5. Shouting or using any voice amplification devices for the purposes of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Suite 207;

6. Accosting, addressing, or offering literature to any employee, agent, client, visitor, or business invitee of plaintiff who has already refused such offer or address;

7. Standing in or stepping in the path or right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California;

8. Photographing or videotaping persons approaching, entering or leaving the premises;

9. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises.

IT IS FURTHER ORDERED, pending the hearing on this matter on February 27, 1989, to which this matter has been continued upon request of respondents, that the above-named defendants and each of them and their agents, servants, employees and representatives, are enjoined and restrained from:

1. Entering on the private parking lot which adjoins the back entrance of the Center's building at 3701 J Street, Suite 207, between the hours of 8:00 a.m to 5:00 p.m., Saturdays;

2. Standing in the street at the entrance to the parking lot which adjoins the Center's premises (I Street), so as to interfere with automobiles entering or leaving the lot;

3. Blocking the front entrance of the medical building at 3701 J Street and/or from picketing, parading, marching, standing, occupying, assemblying, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone ten (10) feet wide on each side of the doorway of the front entrance of the medical building at 3701 J Street, Sacramento, from the doorway to the curb (see attached drawing labeled A).

4. Following within ten (10) feet of clients or patients entering or leaving the Health Center or approaching within ten (10) feet of such persons' cars without being invited. Defendants may hand written information to any person who requests it after being offered the information;

5. Using any voice amplification devices for the purpose of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Suite 207;

6. Accosting, addressing, or offering literature to any employee, agent, client, visitor, or business invitee of plaintiff who has already refused such offer or address;

7. Blocking the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California, from 8:00 a.m to 5:00 p.m.;

8. Photographing or videotaping persons approaching, entering or leaving the premises;

9. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises.

DATED: January 24, 1989.

IT IS SO ORDERED: Jan. 24, 1989

/s/ Ronald B. Robie
JUDGE RONALD B. ROBIE
Judge of the Superior Court

[Exhibit Omitted in Printing]

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

v.

DON BLYTHE, *et al.*

Defendants.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI and JOHN STOOS,

Cross-Complainants,

v.

FEMINIST WOMEN'S HEALTH CENTER, Non-profit Public Benefit Corporation, SHAUNA HECKERT and ROES 1-250, inclusive,

Cross-Defendants.

ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION AGAINST CROSS-DEFENDANTS

[Endorsed Feb. 17, 1989]

On reading the Verified Cross-Complaint on file in the above-named action and the Ex Parte Application to Show Cause and its various accompanying declarations and papers submitted by cross-

complainants, and it appearing to the satisfaction of the court that this is a proper case for granting an order to show cause and good cause otherwise appearing,

IT IS HEREBY ORDERED that the above-named cross-defendants, and each of them, appear in Department 28 of this court, located at 800 H Street, Sacramento, California on March 6, '1989 at 9:00 a.m. to show cause, if any they have, why they and each of them, and their agents, servants, employees and representatives should not be ordered, enjoined and restrained during the pendency of this action as follows, with respect to the premises located at 3701 J Street, Sacramento, California.

1. Cross-complainants, or their agents, shall have the right to select and station one (1) person each at the front and rear entrance to the building located at 3701 J Street. These persons can hand out literature and talk with people entering and leaving the building. No Cross-defendant, their agent, servant, escort or employee may in any way:

(a) Bodily block the person at the entrance from passing out pamphlets or engaging in conversations with people entering or leaving the building;

(b) Interfere with the person at the entrance of the building in passing out pamphlets or in engaging in said conversations;

(c) Block the physical view of the person at the entrance and people entering or leaving the building, whether by blocking the view of the person passing out pamphlets, or by blocking the view of any persons entering or leaving the building.

2. Another Cross-complainant or "pro-life" counselor is allowed on the parking lot and may approach a car as it parks on the lot. If another car enters the parking lot, another cross-complainant or "pro-life counselor may enter onto the lot and approach that car so that there may be one (1) pro-life counselor on

the parking car for each occupied car. No more than one "pro-life" counselor shall approach a vehicle and that person shall not in any way block or interfere with the ingress or egress of the vehicle onto the lot and also shall not block or interfere with the ingress or egress of the persons from the vehicle to the building. All other persons advocating a pro-life viewpoint shall remain on the sidewalk adjoining the premises except as set forth above.

3. The "pro-life" advocate approaching a vehicle on the parking lot may talk with the occupants and may proffer literature and documents to said occupants. A cross-defendant, agent or employee thereof, may approach a vehicle to determine whether the occupant or occupants wish to have an escort to the building. There may be one (1) cross-defendant, agent or employee for each occupied car if the occupant(s) so request. No cross-defendant, agent or employee thereof shall interfere in any way with the right of the cross-complainant or other "pro-life" advocate to proffer literature and documents to the occupants (or former occupants) of the vehicle or to talk and communicate with them. It shall be up to the occupants (or former occupants) of the vehicle to decide whether they wish to accept such literature and documents, and whether they wish to accept the escort services offered.

4. There shall not, at anytime, be more than one (1) cross-complainant or other "pro-life" advocate, nor more than one (1) cross-defendant, agent or employee thereof in the close proximity of the occupants of a vehicle or the former occupants of a vehicle as they walk through the parking lot. The cross-defendant, agent or employee who is escorting such occupant or former occupant shall not in any way either block or interfere with the physical or visual contact between cross-complainant or other "pro-life" advocate and the occupant(s) and former occupant(s) of a vehicle.

5. With respect to the public sidewalk directly in front of the building at 3701 J Street, Sacramento, California, there shall not, at any time be more than one (1) cross-complainant or other "pro-life" advocate nor more than one (1) cross-defendant, agent or em-

ployee thereof in the close proximity of any other person or discrete group of persons walking on this portion of the sidewalk. The cross-defendant, agent of employee who is escorting such person or group of persons shall not in any way either block or interfere with the physical or visual contact between cross-complainant or other "pro-life" advocate and said person or group of persons.

6. No cross-defendant, agent or employee thereof is to touch, whether by backing into them or in any other fashion any cross-complainant or other "pro-life" advocate on or about the premises described in Exhibit "A" without the express written consent of that other person; and no cross-complainant or other "pro-life" advocate is to touch, whether by backing into them, or in any other fashion, any cross-defendant or agent or employee thereof, on or about the premises described in Exhibit "A" without the express written consent on that other person.

7. Cross-complainants, their agents and representatives, shall be permitted to picket on the public sidewalks in front of 3701 J Street and adjacent to the parking lot in the rear of 3701 J Street, but shall not engage in any and all of the following acts:

(a) Physically obstructing the free and direct passage of any person in or out of the building at 3701 J Street.

(b) Physically obstructing, by way of picketing, demonstrating or standing in the ingress or egress to the parking lot adjacent to 3701 J Street.

(c) Shouting, screaming, chanting, yelling, singing or producing noise by any other means in a volume that can be heard in the clinic and that substantially interferes with the provision of medical services provided by cross-defendant.

(d) Having more than ten (10) persons total at any one time engaged in picketing or demonstrating activities adjacent to 3701 J Street.

(e) Menacing, molesting, harassing or interfering with any person entering or leaving 3701 J Street, except as expressly permitted by this Order.

IT IS FURTHER ORDERED that this Order to Show Cause Re Preliminary Injunction is consolidated with the Order to Show Cause previously brought by plaintiff which shall be heard at the time and place specified more fully above.

IT IS FURTHER ORDERED that copies of the Verified Cross-Complaint, supporting Memorandum of Points and Authorities and any declarations and supporting points and authorities filed by defendants and cross-complainants and this Order to Show Cause shall be served on cross-defendants and each of them not later than Feb. 17, 1989. Opposition papers to each Order to Show Cause shall be served and filed not later than 9 am Feb. 27, 1989 and reply papers shall be filed and served not later than 9:00 am Mar. 2, 1989.

DATED: February 17, 1989.

/s/ Anthony DeCristoforo Jr.
Judge of the Superior Court

[Exhibit Omitted in Printing]

APPENDIX F

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, *et al.*,

Defendants.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI and JOHN STOOS,

Cross-Complainants,

vs.

FEMINIST WOMEN'S HEALTH CENTER, a Non-profit Public Benefit Corporation, SHAUNA HECKERT and ROES 1–250, inclusive,

Cross-Defendants.

PRELIMINARY INJUNCTION

[Filed Mar. 9, 1989]

TO THE PARTIES AND THEIR ATTORNIES OF RECORD:

This matter came on regularly for hearing on March 6, 1989, in Department 23 of the above-entitled court, on plaintiff's Motion for

Preliminary Injunction and on defendants' and cross-complainants' Cross-Motion for Preliminary Injunction. Having considered the pleadings, Memoranda of Points and Authorities and the Declarations filed by the parties and after hearing extensive oral argument, the Court, Hon. James T. Ford presiding, issues the following Preliminary Injunction.

Defendants, their agents, servants, employees and representatives, and all of those acting in concert or participating with any of them, are now enjoined and restrained during the pendancy of this action from engaging in, committing, or performing, directly or indirectly any of the following acts:

1. Entering on the private parking lot which adjoins the back entrance of the building at 3701 J Street between the hours of 8:00 a.m. and 10:00 p.m. on Saturdays;

2. Standing in the street at the entrance to the parking lot which adjoins the Health Center's premises (I Street) so as to interfere with automobiles entering or leaving the parking lot; those covered by this Injunction must keep no less than ten (10) feet between themselves and must be moving when any automobile attempts to enter the parking lot;

3. Blocking the front entrance of the medical building at 3701 J Street and/or from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone twenty (20) feet on either side of the front door at 3701 J Street and extending from the building to the curb except that defendants may stand in the area between the planters located on the sidewalk in the front of the 3701 J Street building and the curb so long as they do not enter the area between the planters extending from the front door of the building to the curb of J Street, except for transit purposes. (See attached drawing labeled A);

4. Using any electronic voice amplification devices for the purpose of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Sacramento;

5. Blocking the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California, from 8:00 a.m. to 10:00 p.m.;

6. Photographing or videotaping persons approaching, entering, or leaving the premises at 3701 J Street, Sacramento;

7. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises at 3701 J Street.

Defendants' request for preliminary injunctive relief is denied in all respects.

DATED: March 9th, 1989.

IT IS SO ORDERED:

/s/ James T. Ford
JAMES T. FORD
Judge of the Sacramento
County Superior Court

APPROVED AS TO FORM ONLY

/s/ Samuel B. Casey
SAMUEL B. CASEY

[Exhibit Omitted in Printing]

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO

Case No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, *et al.*,

Defendants.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI and JOHN STOOS,

Cross-Complainants,

vs.

FEMINIST WOMEN'S HEALTH CENTER, a Non-profit Public Benefit Corporation, SHAUNA HECKERT and ROES 1-25, inclusive,

Cross-Defendants.

ORDER SUSTAINING DEMURRER

[Filed Jul. 27, 1989]

This matter came on regularly for hearing on July 19, 1989 at 8:30 a.m. in Department 23 of the above-entitled court on cross-

defendants' demurrer to cross-complainants' second amended complaint and motion to strike allegations in the cross-complaint.

Upon reviewing the memoranda of points and authorities filed by the respective parties and after considering the arguments of the parties at the hearing, the court makes the following ruling:

Cross-defendants' demurrer to cross-complainants' second amended complaint is granted as to the allegations of violation of cross-complainants' first amendment rights without leave to amend. Cross-defendants' remaining demurrers and motions to strike are granted with leave to cross-complainants to amend to allege specific assaults and/or batteries against specific cross-defendants on specific occasions, said amendment to be filed and served on or before July 29, 1989.

Dated: Jul. 27, 1989

/s/ James T. Ford
JAMES T. FORD
Judge
Sacramento Superior Court

APPENDIX H

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

vs.

DON BLYTHE, *et al.*,

Defendants.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI and JOHN STOOS,

Cross-Complainants,

vs.

FEMINIST WOMEN'S HEALTH CENTER, a Non-profit Public Benefit Corporation, SHAUNA HECKERT and ROES 1-250, INCLUSIVE,

Cross-Defendants.

PRELIMINARY INJUNCTION

[Filed Nov. 6, 1989]

TO THE PARTIES AND THEIR ATTORNIES OF RECORD:

This matter came on regularly for hearing on exparte 11-6-1989, in Department 23 of the above-entitled court, on plaintiff's

Motion for Preliminary Injunction and on defendants' and cross-complainants' Cross-Motion for Preliminary Injunction. Having considered the pleadings, Memoranda of Points and Authorities and the Declarations filed by the parties and after hearing extensive oral argument, the Court, Hon. James T. Ford presiding, issues the following Preliminary Injunction.

Defendants, their agents, servants, employees and representatives, and all of those acting in concert or participating with any of them, are now enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly any of the following acts:

1. Entering on the private parking lot which adjoins the back entrance of the building at 3701 J Street between the hours of 6:00 a.m. and 10:00 p.m. on business days.

2. Standing in the street at the entrance to the parking lot which adjoins the Health Center's premises (I Street) so as to interfere with automobiles entering or leaving the parking lot; those covered by this Injunction must keep no less than ten (10) feet between themselves and must be moving when any automobile attempts to enter the parking lot;

3. Blocking the front entrance of the medical building at 3701 J Street and/or from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone twenty (20) feet on either side of the front door at 3701 J Street and extending from the building to the curb except that persons subject to this order may stand in the area in the front of the 3701 J Street building on the sidewalk w/in 3' of the curbline so long as they do not enter the area equal to the width of the door & extending from the front door of the building to the curb of J Street, except for transit purposes. (See attached drawing labeled A);

4. Using any electronic voice amplification devices for the purpose of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Sacramento;

5. Blocking the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California, from 6:00 a.m. to 10:00 p.m. on business days.

6. Photographing or videotaping persons approaching, entering, or leaving the premises at 3701 J Street, Sacramento;

7. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises at 3701 J Street.

Defendants' request for preliminary injunctive relief is denied in all respects.

DATED: March 6, 1989

IT IS SO ORDERED:

/s/ James T. Ford
JAMES T. FORD
Judge of the Sacramento County
Superior Court

[Exhibit Omitted in Printing]

APPENDIX I

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No. 506341

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

v.

DON BLYTHE, MURRAY LEWIS, JAY LEWIS, THERESA MARIE REALI, JOHN STOOS, and DOES 1-200,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

[Filed Nov. 30, 1989]

This matter came on regularly for hearing on November 28, 1989, at 4:00 p.m. in Department 23 of the above-entitled Court, on plaintiff Feminist Women's Health Center's motion for a modification of the preliminary injunction previously issued in this matter on March 9, 1989. Plaintiff's request for modification had been filed on November 6, 1989, at which time certain modifications were made on a temporary basis pending this hearing. This Court now orders the preliminary injunction modified to read as follows:

Defendants, their agents, servants, employees and representatives, and all of those acting in concert or participating with any of them, are now enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly any of the following acts:

1. Entering on the private parking lot which adjoins the back entrance of the building at 3701 J Street between the hours of 6:00 a.m. and 10:00 p.m. on business days;

2. Standing in the street at the entrance to the parking lot which adjoins the Health Center's premises (I Street) so as to interfere with automobiles entering or leaving the parking lot; those covered by this Injunction must keep no less than ten (10) feet between themselves and must be moving when any automobile attempts to enter the parking lot;

3. Blocking the front entrance of the medical building at 3701 J Street and/or from picketing, parading, marching, standing, occupying, assembling, grouping, gathering, inducing, encouraging, or causing such conduct in the following area: a zone twenty (20) feet on either side of the front door at 3701 J Street and extending from the building to the curb except that persons subject to this order may stand in the area in the front of the 3701 J Street Building on the sidewalk within three feet of the curb line, so long as they do not enter the area equal to the width of the door and extending from the front door of the building to the curb on J Street, except for transit purposes. (See attached drawing labeled Exhibit A);

4. Using any electronic voice amplification devices for the purpose of harassment or demonstrating at the Feminist Women's Health Center at 3701 J Street, Sacramento;

5. Blocking the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street, Sacramento, California, from 6:00 a.m. to 10:00 p.m. on business days;

6. Photographing or videotaping persons approaching, entering or leaving the premises at 3701 J Street, Sacramento;

7. Recording license plate numbers of vehicles delivering persons to or removing persons from the premises at 3701 J Street.

Defendants' request for preliminary injunctive relief is denied in all respects.

DATED: November 30, 1989

IT IS SO ORDERED:

/s/ James T. Ford
JAMES T. FORD
Judge of the Sacramento County
Superior Court

[Exhibit Omitted in Printing]

APPENDIX J

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 506341 Dept. 19

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

v.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI and JOHN STOOS,

Defendants.

STATEMENT OF DECISION AND JUDGMENT

[Filed Jul. 2, 1991]

The above-entitled matter came on regularly for trial on April 19, 1991, in Department 19 of the above-entitled Court, the Honorable James L. Long, Judge Presiding, without a jury, and trial was commenced on that date. Plaintiff Feminist Women's Health Center appeared by its attorney Dickstein & Merin by Mark E. Merin and Cathleen Williams. Defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali and John Stoos appeared by their attorney, Michael Imfeld. Defaults were previously entered against defendants Operation Rescue and John Walker.

Oral and documentary evidence was introduced on behalf of the respective parties, the case was argued, briefed, and submitted for decision on May 8, 1991. The Court, having considered the evidence, oral arguments and written briefs of counsel, and be-

ing fully advised, issues the following Statement of Decision and Judgment:

STATEMENT OF DECISION

I. BACKGROUND

Plaintiff Feminist Women's Health Center (FWHC) is a medical clinic at which various reproductive health and gynecological services, including abortions, are offered and performed. FWHC is a tenant at the Physician's Medical Building located at 3701 J Street, in Sacramento.[1]

Defendants are persons who, based on deeply held convictions, oppose abortions. Defendants have, in the past, conducted anti-abortion activities at the front entrance of the Physician's Medical Building at 3701 J Street, along the adjacent public sidewalk, and on the private parking lot which adjoins the back entrance of the Physician's Medical Building.

A temporary restraining order was issued against defendants on January 6, 1989, and was amended twice thereafter. In March of 1989, the Court issued a preliminary injunction regulating defendants' activities, both in front of the premises of 3701 J Street and in the parking lot, until the trial of this case. The preliminary injunction was modified in November of 1989.

Now, by way of this instant action, plaintiffs, on behalf of itself, its clients and prospective clients, seeks a permanent injunction to enjoin defendants from conducting their anti-abortion activities in front of the Physician's Medical Building at 3701 J Street and in the parking lot adjoining the building.

---

[1] A diagram of the Physician's Medical Building at 3701 J Street, the adjacent public sidewalk and the adjoining parking lot is attached hereto as Exhibit "A". The diagram is based on the exhibits, testimony, and the Court's view, which are all part of the record. The dimensions of the parking lot are unknown to the Court as there was no testimony or evidence presented regarding the lot's measurements.

II. STANDING

During the course of the instant trial, defendants have contested FWHC's standing to assert the rights of its patients and to seek relief on their behalf. The identical issue of whether a woman's health clinic has standing to sue on behalf of women seeking abortions at its facility was raised in *Chico Feminist Women's Health Center* v. *Butte Glenn Medical Society* (E.D. CA 1983) 557 F.Supp. 1190. In that case, the court relying on *Committee to Defendant Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252, 262, ruled that providers of abortion services do indeed have standing to sue on behalf of their patients. (*Chico Feminist Women's Health Center* v. *Butte Glenn Medicol Society*, *supra*, 557 F.Supp. at 1200.) Numerous federal circuit courts have also reached similar conclusions. (See *Deerfield Medical Center* v. *City of Deerfield Beach* (5th Cir. Unit B 1981) 661 F.2d 328, 333 n.9, and cases cited therein.)

Based on the above authority, this Court, likewise, finds that plaintiff FWHC has standing before the Court for the injunctive relief requested.

III. PROPRIETY OF PERMANENT INJUNCTION

Due to the fact that injunction is an extraordinary power, it will only issue where, at the time of the judgment, there is a reasonable probability that the past acts complained of will recur. (*Mallon* v. *City of Long Beach* (1958) 164 Cal.App.3d 178, 190.) In other words, injunctive power is not to be used as punishment for past acts; it is to be ordered only where there is evidence that the acts are likely to be repeated in the future. (*Palo Alto-Menlo Park Yellow Cab Co.* v. *Santa Clara County Transit Dist.* (1976) 65 Cal.App.3d 121, 132, citing *Mallon* v. *City of Long Beach, supra,* 164, Cal.App.2d at 190.) No equitable reason for an injunction exists where the proscribed conduct has voluntarily and in good faith been discontinued. (*People* v. *National Association of Realtors* (1981) 120 Cal.App.3d 459, 476; but see *Phipps* v. *Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1118–

19 (compliance with preliminary injunction is not the equivalent of a good faith, voluntary discontinuance of the prior acts).)

The following evidence was presented at the trial in this matter:

Defendants and others, on a fairly regular basis between January of 1988 and April of 1990, have gathered in front of the Physician's Medical Building at 3701 J Street to demonstrate against abortions. The demonstrations which were quite spirited in nature, took place on days when abortions and other medical procedures were being performed at FWHC. Defendants and the others would waive signs at plaintiff's clients and staff. Defendants and the others would also chant, yell and use noise-making devices such as bullhorns and trumpets. The noise level would oftentimes become so great that it could be heard inside plaintiff's office space. Defendants and the other anti-abortion protestors would also attempt to force literature on plaintiff's clients. Defendants would persist in their attempts even after the client indicated her refusal. In an attempt to express their views and to impede the passage of plaintiff's clients into the Physician's Medical Building, defendants and the others would reach for, bump into and surround plaintiff's clients and any persons accompanying the clients. Occasionally, defendants would record the identities of FWHC's clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers.

On days when defendants were joined by a large number of other anti-abortion picketers, at times numbering 150 picketers, defendants and the other anti-abortion demonstrators would position themselves in front of the Physician's Medical Building along the sidewalk on J Street, as well as directly across from FWHC on the other side of J Street. Defendants would join the others in making a human wall which blocked the front entrance to the Physician's Medical Building. On such occasions, women would either be unable to get into the Physician's Medical Building or else would be dissuaded from even trying. Escorts provided by

FWHC would then be required to meet the clients at an agreed-upon location and assist them into the building.

During the time period between January 1988, and April, 1990, defendants and other anti-abortion demonstrators also gathered at the entrance to, and inside of the parking lot of the Physician's Medical Building. Defendants and the other anti-abortion protestors would run up to cars entering the lot and would reach inside the car windows in order to hand out leaflets and pamphlets containing anti-abortion information. Defendants and the others would also follow FWHC's clients to the back entrance of the Physician's Medical Building seeking to talk with and counsel them. Defendants and the others would also block cars from entering the parking lot adjoining the medical building. On at least one occasion, a couple was forced to climb over the fence surrounding the parking lot in order to gain access to the rear entrance of the building.

The noise, confusion and threatening atmosphere outside FWHC on the above occasions rendered the provision of medical care at FWHC difficult and posed a threat to FWHC's patients. Women who had to endure the anti-abortion demonstrators were upset, visibly shaken, and oftentimes were crying. This made the procedure more difficult to perform, made the procedure take longer than necessary, and thereby increased the risk of complication. The doctors themselves found it difficult to relax and concentrate after having to maneuver through anti-abortion demonstrators in order to gain access to FWHC.

Given the pattern and frequency of the complained-of activity, the Court finds a reasonable inference that the conduct by defendants will likely be repeated in the future. (See *Rosicrucian Fellow* v. *Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 144; see also *Kugler* v. *Ryan* (Mo. 1984) 682 S.W.2d 47.)

This conclusion is not altered by the fact that there has been no evidence presented of any activity by defendants during the last 13 months. The Court does not view this period of inactivity

as a voluntary, good faith discontinuance by defendants of their conduct. Instead, it appears that any inactivity by defendants resulted from this Court's issuance of a preliminary injunction in this matter.

This point is amply demonstrated by Mr. Baggett who testified that he would continue to engage in the proscribed conduct if he were not enjoined from so doing. Mr. Baggett explained that if he were not restrained, he would stand in the zone directly abutting the entrance to the Physician's Medical Building where he would offer anti-abortion literature to FWHC's clients. He stated that if a woman refused the literature, he would attempt to offer guidance. If the women still refused his help, Mr. Baggett testified that he would persist in telling the woman about others alternatives for help.

In light of the foregoing, the Court reaches the conclusion that plaintiff's injury is a continuing injury for which no adequate legal remedy is available. Hence, a permanent injunction will issue.

IV. SCOPE OF PERMANENT INJUNCTION

A. *Free Zone*

This Court recognizes the precious nature of the right to speak freely. It also is aware of the preferred position in American Constitutional jurisprudence that "debate on public issues should be uninhibited, robust, and wide open" (*Boos* v. *Berry* (1988) 485 U.S. 312, 318, citing *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 270), particularly when the expression occurs on a public sidewalk where the authority to regulate speech is sharply restricted. (*United States* v. *Grace* (1985) 461 U.S. 171, 177–80.)

At the same time, however, "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on a national question . . . is not absolute. . . ." (*Hague* v. *Committee for Indus. Org.* (1939) 307 U.S. 496, 515–16.) The

First Amendment "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." (*Heffron* v. *International Soc'y for Krishna Consciousness, Inc.* (1981) 452, U.S. 640, 647.) Reasonable "time, place, and manner" regulations may be necessary, (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 115), as long as the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. (*United States* v. *Grace, supra,* 461 U.S. at 177 quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 45.)

1. content-neutral

The geographic restriction imposed by this injunction is based on this Court's findings that (1) defendants obstructed ingress to and egress from the Physician's Medical Building and FWHC by physically blocking the sidewalk leading to the front entrance of the building and/or harassing the individuals seeking to enter FWHC, and (2) defendants' conduct created a substantial risk of harm to FWHC's patients, those persons accompanying the patients, and FWHC's staff members. These findings are not related to the content of defendants' speech, but rather, to defendants' conduct. (*Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 771 (defining content-neutral speech regulations as those that regulate without reference to the content of the regulated speech).)

The place restriction is also not rendered content-based merely by virtue of the fact that only anti-abortion protestors are bound by the speech free zone restriction. A restriction enjoining all protestors of any persuasion, regardless of their conduct, would have been overly broad.[2] (See *Bering* v. *Share* (Wash. 1986) 721

[2] At this point, it should be noted that defendants have requested that the Court enjoin plaintiff's escorts from shielding the women patients as they walk toward the entrance of the Physician's Medical Building. Defendants claim that these escorts have interfered with their First Amendment

P.2d 918, 925-26, citing to *Beckerman* v. *Tupelo Mississippi* (5th Cir. 1981) 664 F.2d 502, 507.)

2. significant government interest

The evidence established that a majority of plaintiff's patients come to FWHC, among other reasons, in order to undergo abortions or for abortion-related services. The evidence also established that defendants' conduct at FWHC interferes with the patient's rights to obtain the desired medical services at FWHC. Because a women's decision to terminate her pregnancy is one of the most private decisions imaginable and because it is protected by both the United States and California Constitutions, (*Roe* v. *Wade* (1973) 410 U.S. 113 (holding that the right of privacy, as guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy); *Chico Feminist Women's Health Center* v. *Scully* (1989) 208 Cal.App.3d 230, 241-42, and cases cited therein), the State has a compelling interest to ensure that a woman has the ability to effectuate her decision within the limits specified in *Roe*, and to do so with the least harassment possible.

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rights to address the women by knocking defendants' arms away as they offer literature, by shoving defendants as they pass, by physically crowding defendants on the sidewalk, by calling defendants offensive names and by drowning defendants out. Defendants also claim that the escorts themselves have used the free zone to engage in free speech activity such as chanting and picketing. Although the Court finds the escorts' conduct objectionable in many respects, it cannot enlarge the scope of the injunction to include the escorts since the cross-complaint against the various escorts was dismissed prior to the trial. (*Watson* v. *Janta Carmelita Etc. Co.* (1943) 58 Cal.App.2d 709, 719 ("cause of action must exist before an injunctive relief can be granted.").)

3. narrowly tailored

Although the Court was presented with several options related to the dimensions of the free zone, it has decided to retain the same place restriction as was set forth in the preliminary injunction. This decision is based primarily on the Court's view of the premises at 3701 J Street, which was conducted pursuant to a stipulation by the parties.

During its view, the Court found J Street to be a very busy, yet narrow four-lane thoroughfare connecting the downtown area of Sacramento with the eastern portions of the city. The Court noted that the high speed of the cars traveling along J Street in front of the Physician's Medical Building, as well as the absence of any loading zone in front of the building, makes stopping directly in front of the main entrance rather prohibitive, thereby forcing those persons seeking to gain access to the building to, in almost all cases, first walk along the front side of the building before turning inward toward the doors. As a result, the geographic restriction limiting activity at the front of the building is drawn as narrowly as possible in order to (1) protect the women's rights to privacy, and (2) not unduly limit defendants' expressive activities.

4. ample alternatives

Although the First Amendment does not afford the right to a captive audience, it does protect the rights of each citizen to "reach the minds of willing listeners." (*Heffron* v. *International Soc'y for Krishna Consciousness, Inc., supra*, 452 U.S. at 655, quoting *Kovacs* v. *Cooper* (1949) 336 U.S. 77, 87; *Cox* v. *Louisiana* (1965) 379 U.S. 536, 555.) The evidence established in the instant case indicates that defendants are not deprived from reaching and winning the attention of plaintiff's clients merely because they are not permitted into a certain zone extending out from either side of the main entrance to the Physician's Medical Building. Defendants have not been removed to a nonaccessible location; they may still protest and carry signs in plain view of persons entering the

Physician's Medical Building. They are also still free to express their message, counsel, or hand out literature to any passerby. If one of FWHC's clients desires to receive information bearing on her decision not have an abortion, the client is free to walk over to defendants and engage them in conversation.

Finally, the free zone being imposed in this case also does not run afoul of the protections afforded by article I, section 2(a) of the California Constitution. Although California's free speech provisions are construed more broadly than those provided by the First Amendment, (*Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908), it is unlikely that they extend so far as to cover the aggressive and coercive nature of defendants' conduct as described above.

B. *Parking Lot*

The First Amendment generally does not guarantee freedom of speech against private infringement. (See, e.g. *Marsh* v. *Alabama* (1946) 326 U.S. 501, 505–06.) That is to say, before an owner of private property can be subject to restriction under the First Amendment, the private property must "assume to some significant degree, the functional attributes of public property devoted to public use." (*Central Hardware Co.* v. *National Labor Relations Bd.* (1972) 407 U.S. 539, 546–47.)

The testimony in the instant case established that FWHC is a small medical clinic providing gynecological care, as well as abortions, family planning and general reproductive health care. The evidence revealed that FWHC is located in the Physician's Medical Building, a privately owned building offering professional and personal services to a selective clientele. According to the testimony, the building's current tenants include FWHC, a pharmacy, and two or three doctors.

The testimony at the trial also indicated that the parking lot which adjoins the back entrance of the Physician's Medical Building is privately owned by the same persons who own the medical

building and that the parking lot is intended to provide a convenient place to park for the employees and clients of the medical building's tenants. The fact that access to the parking lot is limited is made quite clear from signs posted in the lots which proclaim that the parking lot is private property.

Based on the "nature, purposes, and primary use" of the parking lot, as well as the "extent and nature of the public's invitation" to use the lot, (*Brown* v. *Davis* (N.J. Super., 1984) 495 A.2d 900, 903), the Court concludes that the parking lot has not sufficiently been dedicated to public use so as to allow free access for First Amendment purposes. (See *Fardig* v. *Anchorage* (Alas. 1990) 785 P.2d 911, 914 (parking lot of women's clinic where abortions were performed was not public forum because it lacked significant public attributes); *Radich* v. *Goode* (3rd Cir. 1989) 886 F.2d 1391, 1398 (parking lot of abortion clinic not treated as public property for First Amendment purposes merely because public invited to use lot for specified purpose); *Brown* v. *Davis, supra* (parking lot of private medical facility providing abortions not sufficiently public to entitle access for First Amendment purposes).)

The Court's characterization of the parking lot is not altered by evidence produced at the trial that persons periodically cut through the parking lot to reach the convalescent home behind it, or that in two instances, persons from the adjacent apartment complex parked their cars in the Physician's Medical Building lot. Findings of an occasional trespass do not convert the parking lot so as to render it sufficiently public in nature to trigger the application of the First Amendment.

The Court's conclusion is also not altered by the various California cases which, in broadly interpreting article I, section 2(a) of the California Constitution as guaranteeing freedom of speech even against private infringements, have held that free speech is protected in a large, private shopping center, a supermarket type grocery store situated in a privately owned parking area, and a railroad station. (*Robins* v. *Pruneyard Shopping Center, supra; In*

re Lane (1969) 71 Cal.2d 872; *In re Hoffman* (1967) 67 Cal.2d 845.)

These cases are all distinguishable from the findings in the instant case. First of all, neither the Physician's Medical Building, nor its parking lot, possesses the characteristics of a place to which the public is invited. Clients come to the building and park in the adjacent lot in order to visit the specific medical providers and utilize their limited services. In contrast to a shopping mall or supermarket, the Physician's Medical Building is not a place to which a general consumer would go to shop for general merchandise.

Secondly, the medical building and parking lot in the instant case vary dramatically in size from the large supermarket and 21-acre shopping mall which were the subjects of the rulings in *Pruneyard* and *In re Lane*. The court, in *Pruneyard* even went so far as to expressly state that its analysis did not apply to the "proprietor of a modest retail establishment." (*Robins* v. *Pruneyard, supra*, 23 Cal.3d at 910.) Certainly, the Physician's Medical Building and its adjoining parking lot are more closely related in size and function to a modest retail establishment than to a large shopping mall.

Thirdly, activities which are incompatible with the normal character and functioning of a facility need not be tolerated, even if they are occurring in a large shopping center. (*H-CHH Associations* v. *Citizens for Representative Government* (1987) 193 Cal.App.3d 1193.) Since the evidence here has shown that defendants' presence in the parking lot of the Physician's Medical Building has interfered with the basic functioning of FWHC, the instant injunction prohibiting defendants from entering the parking lot during the specified hours to engage in the proscribed conduct is warranted.

Finally, the Court would note that this prohibition against defendants from conducting anti-abortion activities in the parking lot of the Physician's Medical Building does not deprive defendants from altogether presenting their message. Defendants can continue to reach and win their audiences' attention by conducting their

activities on the sidewalk on either side of the parking lot entrance. As was noted above, with respect to the free zone, those persons wishing to engage defendants in conversation are free to walk out to the sidewalk and do so.

C. Other Provisions

In accordance with the Court's findings that defendants' conduct during their anti-abortion demonstrations included shouting, screaming, yelling, etc., and that this conduct substantially interfered with plaintiff's provision of medical services, this Court finds it necessary to include prohibitions against noise in the injunction. (See *Portland Fem. Women's Health Ctr.* v. *Advocates for Life* (9th Cir. 1988) 859 F.2d 681.) In light of testimony which indicated that defendants have in the past recorded the identities of plaintiff's clients and staff members in an attempt to harass and intimidate these persons, the Court additionally finds it necessary to enjoin defendants' from photographing, videotaping, and/or recording the license plate numbers for persons entering or exiting from FWHC. Such conduct substantially interferes with the women's rights of privacy. (See *Chico Feminist Women's Health Ctr.* v. *Scully, supra,* 208 Cal.App.3d at 241–42.)

JUDGMENT

IT IS HEREBY ADJUDGED AND ORDERED that defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali, and John Stoos, their agents, servants, employees and representatives, and all persons, groups and organizations acting in concert with one or more of them, who have actual notice of this Judgment, are PERMANENTLY and FINALLY ENJOINED AND RESTRAINED from:

1. Picketing, parading, marching, standing, occupying, assembling, grouping, gathering, or distributing literature in the following area: a zone 20 feet on either side of the front door at 3701 J Street, Sacramento, California, and extending from the building

to the curb except that persons subject to this order may stand in the area in front of the 3701 J Street building on the sidewalk within three feet of the curb line, so long as they do not enter the area equal to the width of the door and extending from the front door of the building to the curb on J Street, except for transit purposes. (See, Exhibit A, attached.)

2. Inhibiting or impeding or attempting to inhibit or impede the free and unmolested ingress to and egress from 3701 J Street, Sacramento, California, including blocking or attempting to block the right-of-way of plaintiff's employees, agents, clients, visitors, or business invitees on the public sidewalk in front of 3701 J Street.

3. Shouting, screaming, chanting, yelling or producing noise by other means, in a volume that substantially interferes with the provision of medical services by plaintiff.

4. Photographing or videotaping plaintiff's employees, agents, clients, visitors, or business invitees approaching, entering, or leaving the premises at 3701 J Street, Sacramento, California.

5. Recording license plate numbers of vehicles delivering or removing plaintiff's employees, agents, clients, visitors, or business invitees from the premises at 3701 J Street, Sacramento, California.

6. Entering on the private parking lot which adjoins the back entrance of the building at 3701 J Street, Sacramento, California.

7. Interfering with or attempting to interfere with plaintiff's employees, agents, clients, visitors, or business invitees or with any automobile being driven by or occupied by plaintiff's employees, agents, clients, visitors, or business invitees, as such persons or automobiles are entering or leaving the parking lot which adjoins the back entrance of the building at 3701 J Street, Sacramento, California.

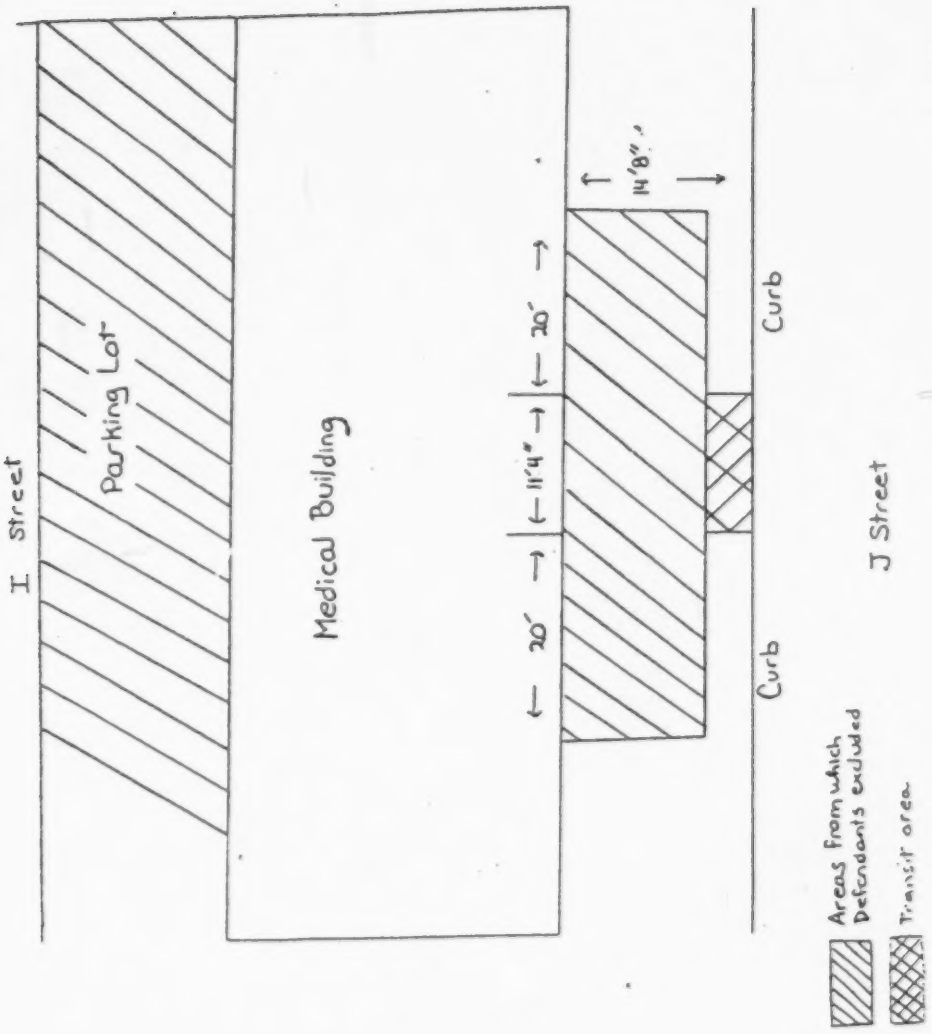
8. Inducing, encouraging, securing or causing other persons to commit any of the acts in paragraphs one through eight above.

Further, plaintiff is awarded costs in such amount as may appear in plaintiff's Memorandum of Costs or as is fixed by the Court on noticed motion.

DATED: Jul 2, 1991

/s/ James L. Long
Judge of the Superior Court

EXHIBIT "A"



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APPENDIX K

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 506341 Dept. 19

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

v.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI, JOHN STOOS, JOHN WALKER, AND OPERATION RESCUE,

Defendants.

ORDER AWARDING ATTORNEYS' FEES
(CODE CIV. PROC., § 1021.5)

[Filed Aug. 29, 1991]

On August 1, 1991, in Department 19 of the above entitled court, before the Honorable James L. Long, Judge Presiding, the motion of plaintiff Feminist Women's Health Center for attorneys' fees pursuant to section 1021.5 of the Code of Civil Procedure came on regularly for hearing. Plaintiff appeared by its attorney, Fred J. Hiestand. Defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali, and John Stoos appeared by their attorney Michael D. Imfeld. Defendants Operation Rescue and John Walker did not appear, having previously defaulted.

Oral and documentary evidence was introduced on behalf of the respective parties, and the cause was argued. The matter was then continued for further hearing to August 12, 1991, at which

time the matter was taken under submission. The Court, having considered the evidence, oral argument and written briefs of counsel, and being fully advised, finds as follows:

I. Entitlement To Fee Award

1. Plaintiff's success in obtaining a permanent injunction has resulted in the protection of the rights of women to avail themselves of abortions and abortion-related services, within the limits specified in *Roe* v. *Wade* (1973) 410 U.S. 113, and with the least amount of harassment possible. As such, plaintiff's action has conferred an important privacy right. (*Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252, 275 (the right of procreative choice is "clearly among the most intimate and fundamental of all constitutional rights"); *Serrano* v. *Priest* (1977) 20 Cal.3d 25, 31 (a significant benefit or important right "may be recognized simply from the effectuation of a fundamental constitutional or statutory policy).)

2. Testimony at the hearing on the instant motion indicated that plaintiff, at its clinic in Sacramento, consulted with and/or treated approximately 2,500 women in 1988, approximately 3,500 women in 1989, approximately 6,000 women in 1990, and approximately 2,500 women by mid-year 1991. The testimony further revealed that of the 6,000 women who sought plaintiff's services in 1990, anywhere from 2,500 to 3,000 of the women obtained abortions, and that by mid-year 1991, roughly 1,300 of the 2,500 women visiting plaintiff's clinic terminated their pregnancies. These numbers reflect that plaintiff's successful prosecution of this case affected a large class of persons. (See *Press* v. *Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 fn.10 (a class is substantial where the number of direct beneficiaries numbers in the thousands).) Moreover, the permanent injunction obtained by plaintiff is not limited to the present time; rather it is a continuing obligation which will benefit plaintiff's future clients. (See *Slayton* v. *Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 552 (the impact of petitioner's action is far greater than respondents acknowledge especially where

all future students and their parents will benefit from respondent's mandatory compliance with the trial court's order).)

3. Testimony at the hearing on the instant motion indicated that the District Attorney refused to assist plaintiff in its efforts to maintain unobstructed ingress to and egress from the clinic. The testimony also indicated that the Sacramento City Police Department was unwilling to make any arrests absent an injunction. The testimony additionally revealed that after many months of meeting, plaintiff exhausted its options with the City Council, thereby rendering private enforcement as plaintiff's sole remaining remedy.

4. Testimony at the hearing on the instant motion revealed that plaintiff agreed to pay its attorneys at the rate of $150 per hour for their services in obtaining an injunction against defendants. The evidence additionally demonstrated that: (a) plaintiff's year-end surpluses of revenues over liabilities for all of its clinics combined amounted to $11,914 in 1988, $15,000 in 1989, and $30,353 in 1990; (b) plaintiff's surpluses are used to subsidize its failing clinics; (c) plaintiff does not include the prosecution of injunctions as one of its standard legal expenses for which it budgets $12,000 to $15,000 annually for all four of its clinics; and (d) most importantly, plaintiff did not pursue damages as part of the underlying action; it merely sought relief on behalf of its patients.[1] As a result, plaintiff's legal victory has placed a burden on plaintiff "out of proportion to [its] individual stake in the matter." (*County of Inyo* v. *City of Los Angeles* (1978) 78 Cal.App.3d 82, 89, quoted with approval in *Woodland Hills Residents Assn., Inc.* v. *City Council* (1979) 23 Cal.3d 917, 941.)

5. Finally, the Court is well aware that an award of attorneys' fees against the private defendants in this case is a harsh result, particularly in light of defendants' financial status. The Court is,

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[1] In its Statement of Decision and Judgment, this Court, relying on *Chico Feminist Women's Health Center* v. *Butte Glenn Medical Society* (E.D. CA 1983) 557 F.Supp. 1190, 1200, ruled that plaintiff, as a provider of abortion services, had standing to seek injunctive relief on behalf of its patients.

however, not aware of any provision within Code of Civil Procedure section 1021.5, or of any case discussing an award of fees under that section, which provides that an unsuccessful party's financial condition may be considered by this Court in determining whether an award of fees is warranted. Moreover, the private, as opposed to public, character of defendants is also irrelevant to the Court's determination. (See *Committee to Defend Reproductive Rights* v. *A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 640 fn.7, and cases cited therein.) The requisite elements justifying an award of attorneys' fees pursuant to the private attorney general doctrine (Code Civ. Proc., § 1021.5) have been satisfied in this case,[2] and the Court is bound by the law. This Court does not engage in judicial activism; defendants' remedy in terms of hardship lies with the Legislature.

II. Calculation Of Fee Award

6. The $91,050 loadstar figure submitted by plaintiff is reasonable. No evidence was presented that the 607 attorney hours accumulated in securing the permanent injunction was excessive, particularly where litigation was on-going over a two-and-one-half year period. Likewise, the hourly fee of $150 charged by plaintiff's attorneys is a fair and reasonable rate for lawyers possessing the level of experience and competence displayed by plaintiff's lawyers.

7. The requested multiplier of 1.5 is unwarranted as none of the factors weighing in favor of an augmentation of the lodestar figure are present. (*Serrano* v. *Priest, supra*, 20 Cal.3d at 49.) Prior to litigating the instant case, attorneys for plaintiff were involved in securing a preliminary injunction against abortion protestors demonstrating outside of an abortion clinic in Chico. (*Chico Femi-*

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[2] The Court has only addressed the applicability of the first three elements of Code of Civil Procedure section 1021.5. The fourth element (i.e., whether fees should, in the interest of justice, be paid out of the recovery) is inapplicable because there was no monetary recovery in this case. (*Phipps* v. *Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1120, fn.6.)

nist Women's Health Center v. *Scully* (1989) 208 Cal.App.3d 230.) The only "new" or different issues raised by this case which were not addressed in the *Chico* case involved (a) the propriety of a permanent injunction; and (b) the characterization of plaintiff's parking lot for purposes of free speech. Neither of these issues was sufficiently difficult to warrant the imposition of a multiplier. Moreover, while there were no California cases discussing the characterization of a small medical building parking lot at the time this case went to trial, the question was, nevertheless, not novel as numerous other jurisdictions had opinions directly in point. (See 73 Ops.Cal.Atty.Gen. 213 (Aug. 7, 1990) and cases cited therein.)

8. Fees in the amount of $8,006.25 which were incurred in the prosecution of the instant attorney fee motion are reasonably included in an award of attorney's fees pursuant to Code of Civil Procedure section 1021.5. (*Serrano* v. *Unruh* (1982) 32 Cal.3d 621, 639 ("fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim").) Costs of $50.73 incurred in prosecuting the instant motion are, likewise, reasonably included in the award of attorneys' fees. (*Bussey* v. *Affleck* (1990) 225 Cal.App.3d 1162, 1165 (statutory attorneys' fees may include reasonable out-of-pocket expenses under Code of Civil Procedure section 1033.5(a)(10) that are normally billable to a client and are not included within the overhead component of the hourly rate).)

IT IS HEREBY ORDERED that plaintiff shall be awarded attorneys' fees in the amount of $99,106.98 against defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali, John Stoos, John Walker, and Operation Rescue, jointly and severally.

IT IS HEREBY FURTHER ORDERED that this award of attorneys' fees shall be incorporated in the Statement of Decision and Judgment filed May 29, 1991.

DATED: Aug. 29, 1991

/s/ James L. Long
Judge of the Superior Court

APPENDIX L

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 506341 Dept. 19

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff,

v.

DON BLYTHE, MURRAY LEWIS, JAY BAGGETT, THERESA MARIE REALI, JOHN STOOS, JOHN WALKER, and OPERATION RESCUE,

Defendants.

AMENDED ORDER AWARDING ATTORNEYS' FEES (CODE CIV. PROC., § 1021.5)

[Filed Sep. 30, 1991]

On August 1, 1991, in Department 19 of the above-entitled court, before the Honorable James L. Long, Judge Presiding, the motion of plaintiff Feminist Women's Health Center for attorney's fees pursuant to section 1021.5 of the Code of Civil Procedure came on regularly for hearing. Plaintiff appeared by its attorney, Fred J. Hiestand. Defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali, and John Stoos appeared by their attorney, Michael D. Imfeld. Defendants Operation Rescue and John Walker did not appear, having previously defaulted.

Oral and documentary evidence was introduced on behalf of the respective parties, and the cause was argued. The matter was then continued for further hearing to August 12, 1991, at which time

the matter was taken under submission. The Court, having considered the evidence, oral arguments and written briefs of counsel, and being fully advised, finds as follows:

I. Entitlement To Fee Award

1. Plaintiff's success in obtaining a permanent injunction has resulted in the protection of the rights of women to avail themselves of abortions and abortion-related services, within the limits specified in *Roe* v. *Wade* (1973) 410 U.S. 113, and with the least amount of harassment possible. As such, plaintiff's action has conferred an important privacy right. (*Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252, 275 (the right of procreative choice is "clearly among the most intimate and fundamental of all constitutional rights"); *Serrano* v. *Priest* (1977) 20 Cal.3d 25, 31 (a significant benefit or important right "may be recognized simply from the effectuation of a fundamental constitutional or statutory policy).)

2. Testimony at the hearing on the instant motion indicated that plaintiff, at its clinic in Sacramento, consulted with and/or treated approximately 2,500 women in 1988, approximately 3,500 women in 1989, approximately 6,000 women in 1990, and approximately 2,500 women by mid-year 1991. The testimony further revealed that of the 6,000 women who sought plaintiff's services in 1990, anywhere from 2,500 to 3,000 of the women obtained abortions, and that by mid-year 1991, roughly 1,300 of the 2,500 women visiting plaintiff's clinic terminated their pregnancies. These numbers reflect that plaintiff's successful prosecution of this case affected a large class of persons. (See *Press* v. *Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 321 fn.10 (a class is substantial where the number of direct beneficiaries numbers in the thousands).) Moreover, the permanent injunction obtained by plaintiff is not limited to the present time; rather it is a continuing obligation which will benefit plaintiff's future clients. (See *Slayton* v. *Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 552 (the impact of petitioner's action is far greater than respondents acknowledge especially where

all future students and their parents will benefit from respondent's mandatory compliance with the trial court's order).)

3. Testimony at the hearing on the instant motion indicated that the District Attorney refused to assist plaintiff in its efforts to maintain unobstructed ingress to and egress from the clinic. The testimony also indicated that the Sacramento City Police Department was unwilling to make any arrests absent an injunction. The testimony additionally revealed that after many months of meetings, plaintiff exhausted its options with the City Council, thereby rendering private enforcement as plaintiff's sole remaining remedy.

4. Testimony at the hearing on the instant motion revealed that plaintiff agreed to pay its attorneys at the rate of $150 per hour for their services in obtaining an injunction against defendants. The evidence additionally demonstrated that: (a) plaintiff's year-end surpluses of revenues over liabilities for all of its clinics combined amounted to $11,914 in 1988, $15,000 in 1989, and $30,353 in 1990; (b) plaintiff's surpluses are used to subsidize its failing clinics; (c) plaintiff does not include the prosecution of injunctions as one of its standard legal expenses for which it budgets $12,000 to $15,000 annually for all four of its clinics; and (d) most importantly, plaintiff did not pursue damages as part of the underlying action; it merely sought relief on behalf of its patients.[1] As a result, plaintiff's legal victory has placed a burden on plaintiff "out of proportion to [its] individual stake in the matter." (*County of Inyo* v. *City of Los Angeles* (1978) 78 Cal.App.3d 82, 89, quoted with approval in *Woodland Hills Residents Assn., Inc.* v. *City Council* (1979) 23 Cal.3d 917, 941.)

5. Finally, the Court is well aware that an award of attorneys' fees against the private defendants in this case is a harsh result, particularly in light of defendants' financial status. The Court is,

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[1] In its Statement of Decision and Judgment, this Court, relying on *Chico Feminist Women's Health Center* v. *Butte Glenn Medical Society* (E.D. CA 1983) 557 F.Supp. 1190, 1200, ruled that plaintiff, as a provider of abortion services, had standing to seek injunctive relief on behalf of its patients.

however, not aware of any provision within Code of Civil Procedure section 1021.5, or of any case discussing an award of fees under that section, which provides that an unsuccessful party's financial condition may be considered by this Court in determining whether an award of fees is warranted. Moreover, the private, as opposed to public, character of defendants is also irrelevant to the Court's determination. (See *Committee to Defend Reproductive Rights* v. *A Free Pregnancy Center* (1991) 229 Cal.App.3d 633, 640 fn.7, and cases cited therein.) The requisite elements justifying an award of attorneys' fees pursuant to the private attorney general doctrine (Code Civ. Proc., § 1021.5) have been satisfied in this case,[2] and the Court is bound by the law. This Court does not engage in judicial activism; defendants' remedy in terms of hardship lies with the Legislature.

II. Calculation Of Fee Award

6. The $91,050 loadstar figure submitted by plaintiff is reasonable. No evidence was presented that the 607 attorney hours accumulated in securing the permanent injunction was excessive, particularly where litigation was on-going over a two-and-one-half year period. Likewise, the hourly fee of $150 charged by plaintiff's attorneys is a fair and reasonable rate for lawyers possessing the level of experience and competence displayed by plaintiff's lawyers.

7. The requested multiplier of 1.5 is unwarranted as none of the factors weighing in favor of an augmentation of the lodestar figure are present. (*Serrano* v. *Priest, supra*, 20 Cal.3d at 49.) Prior to litigating the instant case, attorneys for plaintiff were involved in securing a preliminary injunction against abortion protestors

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[2] The Court has only addressed the applicability of the first three elements of the Code of Civil Procedure section 1021.5. The fourth element (i.e., whether fees should, in the interest of justice, be paid out of the recovery) is inapplicable because there was no monetary recovery in this case. (*Phipps* v. *Saddleback Valley Unified School Dist.* (1988) 204 Cal.App.3d 1110, 1120, fn.6.)

demonstrating outside of an abortion clinic in Chico. (*Chico Feminist Women's Health Center* v. *Scully* (1989) 208 Cal.App.3d 230.) The only "new" or different issues raised by this case which were not addressed in the *Chico* case involved (a) the propriety of a permanent injunction; and (b) the characterization of plaintiff's parking lot for purposes of free speech. Neither of these issues was sufficiently difficult to warrant the imposition of a multiplier. Moreover, while there were no California cases discussing the characterization of a small medical building parking lot at the time this case went to trial, the question was, nevertheless, not novel as numerous other jurisdictions had opinions directly in point. (See 73 Ops.Cal.Atty.Gen. 213 (Aug. 7, 1990) and cases cited therein.)

8. Fees in the amount of $8,006.25 which were incurred in the prosecution of the instant attorney fee motion are reasonably included in an award of attorney's fees pursuant to Code of Civil Procedure section 1021.5. (*Serrano* v. *Unruh* (1982) 32 Cal.3d 621, 639 ("fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim").) Costs of $50.73 incurred in prosecuting the instant motion are, likewise, reasonably included in the award of attorneys' fees. (*Bussey* v. *Affleck* (1990) 225 Cal.App.3d 1162, 1165 (statutory attorneys' fees may include reasonable out-of-pocket expenses under Code of Civil Procedure section 1033.5(a)(10) that are normally billable to a client and are not included within the overhead component of the hourly rate).)

IT IS HEREBY ORDERED that plaintiff shall be awarded attorneys' fees in the amount of $99,106.98 against defendants Don Blythe, Murray Lewis, Jay Baggett, Theresa Marie Reali, John Stoos, John Walker, and Operation Rescue, jointly and severally.

IT IS HEREBY FURTHER ORDERED that this award of attorneys' fees shall be incorporated in the Statement of Decision and Judgment filed July 2, 1991.

DATED: Sep. 30, 1991

/s/ James L. Long
Judge of the Superior Court

APPENDIX M

SACRAMENTO
SUPERIOR AND MUNICIPAL COURTS

February 9, 1994

JUDGE JAMES L. LONG

Dept. No. 19

506341

FEMINIST WOMEN'S HEALTH CENTER

vs

DON BLYTHE, *et al.*

NATURE OF PROCEEDINGS:

MOTION FOR ATTORNEY'S FEES—*ORDER*

Plaintiff's motion for attorney's fees pursuant to Code of Civil Procedure section 1021.5 is granted as follows:

Plaintiff shall recover total attorney's fees of $30,601.50. This award represents the $31,132.75 originally requested by plaintiff plus $787.50 incurred in the preparation of the reply brief less $918.75 from Mr. Hiestand's fees for time spent exclusively on the claims of defendants Walker and Operation Rescue (one hour on April 27, 0.5 hours on May 5, 2.25 hours on August 8, and 1.50 hours on August 23) less $400 from Mr. Merin's fees for time

spent exclusively on the claims of defendants Walker and Operation Rescue.

The court finds that the claims pertaining exclusively to Walker and Operation Rescue were a very small portion of the time expended on the appeal as evidenced by the attorney's declarations, the statements of counsel at the hearing, and the appellate decision. The court finds $30,601.50 to be a reasonable amount of fees for what was required and accomplished at the appellate level.

The court has considered each of the arguments made by defendants and finds them to be without merit.

DATED: FEBRUARY 9, 1994

[SEAL]

/s/ James L. Long
Judge

APPENDIX N

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Sacramento County)

C011874

(Super.Ct.No. 506341)

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff, Cross-Defendant and Respondent,

v.

DON BLYTHE, et al.,

Defendants, Cross-Complainants and Appellants.

CERTIFIED FOR PARTIAL PUBLICATION*

[Filed Aug. 19, 1993]

APPEAL from an order of the Superior Court of Sacramento County, James L. Long, Judge. Reversed in part, affirmed in part.

Michael D. Imfeld, Mike Millen, and David L. Llewellyn, Attorneys for Defendants, Cross-Complainants, and Appellants.

Mark E. Merin, Dickstein & Merin, and Fred J. Hiestand for Plaintiff, Cross-Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and II.

In this appeal from a judgment granting a permanent injunction imposing time, place and manner restrictions on the activities of antiabortion demonstrators at plaintiff's Sacramento clinic and from an order awarding attorney fees to plaintiff pursuant to Code of Civil Procedure section 1021.5, we reject defendants' various challenges to the propriety and scope of the injunction. As we shall explain, the evidence supports a finding that defendants' conduct posed a significant threat of harm to plaintiff's patients, infringed upon the patients' right to privacy, and would continue if not enjoined permanently; the designation of a "speech free zone" in front of plaintiff's clinic and the building's private parking lot driveway was based not upon the content of defendants' speech but upon conduct of defendants which was unprotected by the First Amendment to the United States Constitution and article I section 2 of the California Constitution; and the injunction was tailored narrowly to protect the patients' privacy interest while providing defendants with ample opportunity to communicate their antiabortion message.[1]

We also uphold the attorney fee order as to all defendants except John Walker and Operation Rescue. As we shall explain, the record supports the trial court's finding that plaintiff did not have a sufficient financial interest in this litigation to preclude an attorney fee award and that plaintiff's primary motivation in seeking the injunction was to further the public interest of protecting its patients' constitutional rights to abortion by ensuring that their access to abortion services was not restricted unlawfully. In addition, we conclude, for reasons which follow, that the attorney fee

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[1] A joint notice of appeal was filed by all defendants. In that notice, defendants John Walker and Operation Rescue appeal only from the order awarding attorney fees. The remaining defendants appeal from both the judgment granting the permanent injunction and the order awarding attorney fees. Because Walker and Operation Rescue do not appeal from the judgment granting the permanent injunction, we need not address any contentions in their briefs relating to that judgment. Accordingly, any reference to "defendants" in connection with issues raised in the appeal from the judgment granting the permanent injunction refer to defendants other than Walker and Operation Rescue.

award will not operate to chill the constitutional rights to freedom of speech because even the most naive person would have known defendants' conduct—blocking access to the clinic and engaging in acts of assault and harassment to prevent women who had expressed disinterest in defendants' views from exercising the constitutional right to abortion—was not protected by the First Amendment to the United States Constitution or by article I, section 2 of the California Constitution, and because the attorney fee order does not prevent defendants from continuing to demonstrate and exercise their freedom of speech within the lawful limits set forth in the injunction.

We shall reverse the attorney fee order as to defaulting defendants Walker and Operation Rescue because plaintiff's complaint did not demand such attorney fees and Code of Civil Procedure section 580 precludes an award against a defaulting defendant which exceeds the relief demanded in the complaint.

In the unpublished portions of our opinion, we reject defendants' contentions that the trial court erred in ruling on the admissibility of certain evidence and that the court's statement of decision is inadequate.

FACTS AND PROCEDURAL BACKGROUND

Viewed in the light most favorable to the judgment (Estate of Leslie (1984) 37 Cal.3d 186, 201), the facts are as follows:[2]

Plaintiff is a nonprofit corporation operating four medical clinics in Northern California, including one located on J Street in Sacramento (hereafter "the clinic") which is the subject of the injunction in this case. The clinic is open six days a week and provides gynecological health care, birth control services, pregnancy testing and screening, sexually transmitted disease testing and screening, and abortions. The clinic is on the second floor of

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[2] We summarize the facts in the present tense as they existed at the time of the trial court hearing in this action.

a medical building in which several doctors' offices and a pharmacy also are located. The front entrance of the building opens onto a sidewalk running parallel to J Street along the entire length of the building and extending from the front of the building to J Street. The back entrance opens onto a 40-space parking lot to which there is access from I Street. Signs posted in the parking lot state that it is reserved for the use of tenants of the building and their customers and that trespassers will be prosecuted under Penal Code section 602.

Defendants are Jay Baggett, Don Blythe, Murray Lewis, Theresa Reali, John Stoos, John Walker and Operation Rescue (hereafter we shall refer to these parties collectively as "defendants"). According to the record, Operation Rescue is a national antiabortion group whose members are willing to risk arrest in an effort to blockade abortion clinics and make it impossible for patients to enter medical facilities where abortions are performed. There is no evidence that any of the individual defendants are members of or affiliated with Operation Rescue.

The clinic opened in June 1987. Defendants commenced antiabortion demonstrations there in early 1988. Every Saturday, one or more of the defendants and others would arrive at the clinic and use various techniques in an effort to counsel patients and persuade or stop them from submitting to abortions. These techniques included picketing in front of the medical building and in the parking lot, distributing antiabortion literature both inside and outside of the medical building, blocking or impeding entrance to the building and the parking lot, hitting the hoods of cars entering the parking lot, blocking the doors of arriving patients' vehicles in the parking lot so that patients had difficulty getting out and entering the clinic, following patients in order to give them literature even if the patients indicated they were not interested, stepping into the paths of patients as they approached the clinic, urging patients not to "kill" their babies, shouting "murder, murder, murder" at patients, and pointing cameras at them.

The antiabortion demonstrations have caused problems for patients trying to enter the clinic. As previously noted, among other things demonstrators have blocked patients at the entrance to the medical building and have refused to leave. The clinic has received telephone calls from patients in nearby phone booths complaining they were unable to enter the clinic. When clinic staff offered to help and went out to escort those patients into the building, the patients sometimes could not be found. Other patients rescheduled appointments to avoid the demonstrations and called the clinic to request escort assistance into the building. Several times, police assistance has been necessary to stop blocking of the parking lot and building entrance and other activities of the demonstrators. After the district attorney's office declined to prosecute defendants who had been arrested for trespass, the parking lot "became a sort of battleground," and patients were unable to get out of their cars or enter the building without being subjected to the conduct summarized above.

The noise made by picketing demonstrators and the confrontations and other activities initiated by defendants and others at the clinic have upset and agitated clinic patients. In some instances, patients have been reduced to tears. This heightened level of anxiety has required that abortion patients receive greater amounts of medication and has lengthened the time necessary to perform abortion procedures, thereby increasing the risks to patients. Heightened anxiety of staff members, including the doctors performing abortions, has impaired their concentration, further increasing the risks to patients.

On January 6, 1989, plaintiff obtained a temporary restraining order imposing time, place and manner restrictions on the antiabortion activities of defendants as well as their agents, servants, employees and representatives. On March 6, 1989, the court granted plaintiff's motion for a preliminary injunction.

After the temporary restraining order and preliminary injunction issued, antiabortion activities at the clinic continued, including the

use of cameras, bumping into and pushing aside "escorts" hired by the clinic to assist patients in entering the building, following patients into restricted areas, blocking cars attempting to enter the parking lot, persisting in offering literature refused by patients, blocking passage on the sidewalk in front of the medical building, and picketing in restricted areas.

Defendants John Walker and Operation Rescue did not appear, and a default judgment was entered against them. Plaintiff's application for a permanent injunction was tried against the remaining defendants, and judgment was entered in plaintiff's favor for a permanent injunction prohibiting (1) any activity within a "speech free zone" defined as a rectangle extending from the front of the medical building to three feet short of the curb on J Street and 20 feet on either side of the front door, (2) blocking ingress and egress of clinic patients and staff on the sidewalk in front of the medical building, (3) yelling or otherwise producing loud noise which interferes with clinic operations, (4) photographing or videotaping clinic patients, visitors or staff, (5) recording license plate numbers of vehicles visiting the clinic, (6) entering the medical building parking lot, (7) interfering with automobiles entering or leaving the parking lot, and (8) inducing others to do any of the above.

Following trial, plaintiff moved for an award of attorney fees pursuant to Code of Civil Procedure section 1021.5. The court awarded $99,106.98 against all defendants jointly and severally, including Walker and Operation Rescue.

DISCUSSION

I *

Defendants offered two exhibits—a 35-page document entitled "CLINIC DEFENSE/A Model" (Exhibit CC), and a videotape showing conduct by clinic escorts outside another Sacramento abortion clinic (Exhibit II)—as relevant to the credibility of plaintiff's witnesses and to the issue of defendants' right to reasonable

opportunities to communicate their views through picketing and demonstrating. As to those issues, the evidence showed that, in order to counter defendants' activities, plaintiff arranged for escorts to meet patients at their cars or as they approached the medical building and to walk with them to the clinic. Defendant Jay Baggett testified these escorts often shielded patients from demonstrators, making communication impossible. According to Baggett, the escorts, and in particular plaintiff's escort coordinator, Allison Gude, were verbally and physically abusive, took prolife literature away from patients, held umbrellas or signs between demonstrators and patients, interfered with conversations between demonstrators and patients, mocked demonstrators and threatened them.

Gude, who provided much of the evidence regarding the post-temporary-restraining-order conduct of defendants and others, denied interfering with the ability of demonstrators to communicate with patients, denied initiating physical contact with demonstrators, and testified she was unaware of any escorts shielding patients with signs.

Defendants contend the trial court erred in refusing their offer of Exhibits CC and II without first reviewing the exhibits. Defendants' offer of proof was submitted in writing in a 28-page document. In addition to describing the purpose and relevance of the evidence, this document included excerpts from Exhibit CC describing suggested conduct of clinic escorts, including "bullying" prolife picketers with superior numbers, "dogging" prolife demonstrators, using visual blocks or chants to screen patients from prolife picketers, falsely accusing prolife demonstrators of unprivileged physical contact, committing acts of violence before police arrive, "baiting" prolife picketers with language having sexual or religious themes, and using the speech free zone for proabortion propaganda. The written offer of proof described Exhibit II, the videotape, as showing Gude and other escorts "using tactics described in [Exhibit CC]." Defendants made additional offers during the course of trial.

Defendants cite no authority requiring the trial court to review the exhibits themselves before making its ruling. When an objection is raised to the admission of evidence, the proponent normally is required to make an offer of proof setting forth with specificity the "substance, purpose, and relevance" of the evidence. (Evid. Code, § 354, subd. (a); 3 Witkin, Cal. Evidence (3d ed. 1986) (Introduction of Evidence at Trial, §§ 2041-2042, pp. 2000-2001.) The court makes its ruling based on this offer of proof. Defendants' 28-page written offer of proof was sufficient for the court to determine whether exhibits CC and II should be admitted. Nothing more would have been gained by reviewing the exhibits themselves. To the contrary, the offer of proof was more focused and explicit in highlighting the relevant portions of those materials.

Defendants contend that, in any event, the trial court erred in rejecting their offer of proof. The court excluded the evidence on the basis of Evidence Code section 352, concluding its probative value was "substantially outweighed" by the threat of undue consumption of time. Evidence Code section 352 permits the exclusion of relevant evidence under these circumstances in the discretion of the trial court, and the exercise of such discretion shall not be disturbed on appeal absent a clear showing of abuse. (People v. Barrow (1976) 60 Cal.App.3d 984, 995.)

To the extent the exhibits tended to impeach Gude's testimony regarding escort conduct, they were relevant as defendants suggest. However, this relevance is attenuated. Although Gude is pictured on several pages in Exhibit CC and acknowledged having prepared a portion of it, Exhibit CC actually was created by BACAOR, the Bay Area Coalition Against Operation Rescue, and was written in March 1990, after the events involved in this dispute and after Gude ceased functioning as escort coordinator for the clinic. Furthermore, the portion prepared by Gude related to temporary restraining orders and did not deal with any escort conduct of which defendants complain. Exhibit II similarly depicts conduct by Gude at another abortion clinic after she ceased functioning as escort coordinator for the clinic.

The trial court concluded that introduction of the exhibits would cause undue consumption of time. This was consistent with repeated rulings by the court excluding evidence presented by either side regarding conduct at other abortion clinics. The court was concerned such testimony would invite additional evidence regarding conduct at all other clinics by any of the clinic escorts, the individual defendants or Operation Rescue. The same can be said of Exhibits CC and II. Their introduction would have invited evidence of escort conduct at all clinics during any period of time. Though relevant to demonstrate that the escort techniques outlined in Exhibit CC and depicted in Exhibit II were followed elsewhere and at other times, which in turn would raise an inference that those techniques were used at the clinic, this easily could result in a substantial prolongation of the trial. The trial court did not abuse its discretion in concluding this risk outweighed the marginal probative value of the evidence.

In a footnote in their brief, defendants also contend the trial court erred in excluding proffered expert testimony regarding what information women should be provided before deciding to have an abortion and what they should be told about Dr. Steir's background, i.e., malpractice claims asserted against him and the suspension of his surgical privileges elsewhere. However, because these points were not presented under separate headings or subheadings and because defendants have provided no argument or authorities in support of the contention, it is deemed waived. (Cal. Rules of Court, rule 15(a); Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal.App.3d 218, 228.)

II *

Defendants next challenge the adequacy of the trial court's statement of decision.

Upon request of a party following a bench trial, the court must issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.) A request for statement of decision

must specify the issues to be covered and must be filed within 10 days of announcement of a tentative decision. (*Ibid.*) Thereafter, the court shall issue a proposed statement of decision, to which the parties may file objections after which the court issues its final statement of decision and judgment. (Cal. Rules of Court, rule 232.)

Following trial in this case, the court issued a statement of decision and judgment granting a permanent injunction. Defendants filed a request for specification of issues and objections to the statement of decision, after which the court issued its final Statement of Decision and Judgment. This 17-page document outlined in detail the specific conduct of "defendants and others" justifying injunctive relief. It also undertook to justify the scope of the injunction and to demonstrate the injunction was content neutral and was narrowly tailored to provide ample alternatives. In addition, it gave reasons for the noise limitations and prohibitions against cameras and recording of license plate numbers.

Defendants contend the statement of decision is inadequate because it fails to differentiate among the various defendants and others involved in antiabortion activities at the clinic. According to defendants, the trial court was required to specify which individuals participated in which acts. Otherwise, they argue, review of their challenges to the sufficiency of the evidence will be "difficult at best."

There is no requirement the trial court provide separate findings for each defendant. All that is required in a statement of decision is an explanation of the factual and legal basis for the ultimate decision on the principal controverted issues. (Hellman v. LaCumbre Golf & Country Club (1992) 6 Cal.App.4th 1224, 1230.) Here, the statement of decision indicated, for example, that "[d]efendants and others, on a fairly regular basis between January of 1988 and April of 1990, have gathered in front of the Physician's Medical Building at 3701 J Street to demonstrate against abortions[,]" "would waive signs at plaintiff's clients and staff[,]"

"would also chant, yell and use noise-making devices such as bullhorns and trumpets[,]" "would also attempt to force literature on plaintiff's clients[,]" "would persist in their attempts even after the client indicated her refusal[,]" "would reach for, bump into and surround plaintiff's clients and any persons accompanying the clients[,]" and "would record the identities of [plaintiff's] clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers."

A finding that "defendants and others" engaged in the indicated conduct necessarily implies all defendants committed all the acts enumerated. No further specification is necessary.

Defendants also contend the statement is inadequate because it contains no findings regarding escort conduct, which they argue is necessary in order to determine if the injunction affords them adequate means of communication. This is not supported by the record. Among its many other findings, the court in the statement of decision found defendants "are not deprived from reaching and winning the attention of plaintiff's clients merely because they are not permitted into a certain zone extending out from either side of the main entrance to the Physician's Medical Building. Defendants have not been removed to a nonaccessible location; they may still protest and carry signs in plain view of persons entering the Physician's Medical Building. They are also still free to express their message, counsel, or hand out literature to any passerby. If one of [plaintiff's] clients desires to receive information bearing on her decision not to have an abortion, the client is free to walk over to defendants and engage them in conversation."

Necessarily included in the court's finding that defendants are not precluded from communicating with clinic patients is an intermediate factual determination that escort conduct, whatever it might be, does not interfere with such communication. "[A] trial court rendering a statement of decision under Code of Civil Procedure section 632 is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include

findings on all intermediate evidentiary facts necessary to sustain them. [Citation.]" (In re Cheryl E. (1984) 161 Cal.App.3d 587, 599.) Here, the ultimate fact was whether defendants had an adequate means of communication despite the injunction and escort conduct. The nature and effect of escort conduct is subsumed within this ultimate fact. The statement of decision is adequate.

The defendants' objections set forth specific, additional issues they wished to have addressed in the statement of decision, such as whether the sidewalk in front of the medical building is "a traditional public forum" and what evidence exists that others were acting as agents for the answering defendants. The statement of decision did not address these issues. However, defendants do not contend on appeal that the court's failure to include a discussion of these issues was error. Accordingly, the issue is waived.

III

Defendants contend their conduct was not sufficiently egregious to warrant entry of a permanent injunction. They argue the cases relied upon by plaintiff in the trial court, Steiner v. Long Beach Local No. 128 (1942) 19 Cal.2d 676 and M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union (1981) 124 Cal.App.3d 666, where injunctive relief was upheld, involved threats and violence, neither of which is present here. The contention has no merit.

"Injunctive relief rests in the sound discretion of the court (*Merced Mining Co.* v. *Fremont* (1857) 7 Cal. 317, 327-328), to be exercised in accordance with well settled equitable principles and in light of all the facts and circumstances in the case. 'In an equity case the trial court "has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable".' (*Wholesale T. Dealers* v. *National etc. Co.* (1938) 11 Cal.2d 634, 662 [82 P.2d 3, 118 A.L.R. 486].)" (Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal.App.3d 121, 132.)

Civil Code section 3422 authorizes a permanent injunction "to prevent the breach of an obligation existing in favor of the applicant: [¶] 1. Where pecuniary compensation would not afford adequate relief; [¶] 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; [¶] 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or, [¶] 4. Where the obligation arises from a trust."

Violence or even the threat of violence is unnecessary. Nonetheless, viewed in the light most favorable to the judgment, the evidence in this matter establishes that a significant level of harm *is* threatened by defendants' conduct. Plaintiff's medical director, Dr. Steir, testified an abortion is a procedure requiring a great deal of concentration. Because it is done with local anesthesia, the procedure requires the cooperation of the patient. Increased anxiety of patients, as well as staff, brought on by antiabortion activities increases the risks to the patient. Dr. Steir also described problems which could arise where a patient involved in a two-day procedure fails to return to the clinic on the second day.[3] Moreover, there is the simple fact that potential clinic patients may be intimidated from seeking the clinic's services and thereby deprived of *their* rights.

Defendants also contend a permanent injunction was inappropriate because no evidence was presented suggesting the conduct supporting the temporary restraining order and preliminary injunction would be resumed if not permanently enjoined. In support if this claim, defendants point to the lack of evidence of prohibited conduct at the clinic for more than a year before trial.

Because injunction is an extraordinary remedy, the remedy should not be exercised unless it is reasonably probable the acts

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[3] An abortion performed after 12 weeks of pregnancy is a two-day procedure. On the first day a "Laminara" is inserted to dilate the cervix. The next day the actual operation is performed. According to Dr. Steir, life-threatening complications can result if the patient does not return after the first day.

complained of will recur. "Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur. A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future." (Mallon v. City of Long Beach (1958) 164 Cal.App.2d 178, 190, citations omitted.)

Defendants claim the only evidence presented of their current activities and intentions was the testimony of Jay Baggett. Baggett indicated that, if not prohibited by the injunction, he would like to resume following patients as they approach the clinic, offering literature repeatedly despite being ignored, and telling patients they are making the wrong choice. Defendants argue this testimony does not establish what Baggett *would* do if not enjoined. They further argue Baggett actually ceased activities at the clinic because of escort conduct.

Regardless of whether Baggett's testimony established what he would do if permitted, it was reasonable for the trial court to conclude the prohibited conduct would resume unless permanently enjoined. The subject of this dispute is so intensely divisive, and the antagonists so passionately committed to their respective positions, it is not reasonable to expect that activists on either side of the controversy would give up their convictions or cease their attempts to sway others. "Whether abortions should be legal is one of the most hotly contested issues of our day." (Portland Fem. Women's H. Ctr. v. Advocates for Life (9th Cir. 1988) 859 F.2d 681, 685.) The nature of the issue involved, plus the persistent and prolonged nature of defendants' activities at the clinic before issuance of the temporary restraining order and preliminary injunction, indicate such conduct was discontinued at least in part because of the legal prohibition. Compliance with a court order is not voluntary discontinuance of prohibited conduct. (Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal.App.3d 1110, 1118–1119.)

Even if antiabortion activities were discontinued in part because of escort conduct, this would not suggest that a permanent injunction is inappropriate. Escorts were not hired by the clinic until after the commencement of antiabortion activities. Their precise function was to assist patients in avoiding the harassing conduct of the demonstrators and to monitor compliance with the temporary restraining order and preliminary injunction. The decision whether to issue a permanent injunction should not turn on the continuation of such self-help efforts by the plaintiff.

IV

Defendants' primary challenge is to the breadth of the injunction. They contend that free speech activities cannot be excluded from the parking lot or sidewalk in front of the medical building. They further contend that use of a speech free zone without restrictions on escort conduct makes the injunction content specific and leaves them without a reasonable alternative for communicating with clinic patients.

We first address defendants' exclusion from the parking lot. This lot is of modest size and is posted for use only by tenants of the medical building and their clients.

The First Amendment to the United States Constitution and Article I, section 2 of the California Constitution protect the right of free speech. The courts of this state repeatedly have protected the exercise of free speech rights in public places as well as on private property which has taken on the attributes of public property.

In In re Hoffman (1967) 67 Cal.2d 845, the court held that individuals cannot be prohibited from exercising free speech rights in a railway station which houses a restaurant, snack bar, cocktail lounge, and magazine stand and which is open to the general public. The court indicated: "[A] railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy

within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests." (*Id.*, at p. 851.)

In In re Lane (1969) 71 Cal.2d 872, the court held that union picketers cannot be excluded from a private sidewalk leading to a "large 'super-market-type' grocery store." (*Id.*, at pp. 873, 876–877.) Due to a large parking lot surrounding the store, the only other available forum was the public sidewalk between 150 and 280 feet away from the store. The court explained: "[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment." (*Id.*, at p. 878.)

Despite subsequent United States Supreme Court decisions which have taken a more restricted view of First Amendment rights on private property (see Lloyd Corp. v. Tanner (1972) 407 U.S. 551 [33 L.Ed.2d 131]; Hudgens v. NLRB (1976) 424 U.S. 507 [47 L.Ed.2d 196]), the California Supreme Court has held by virtue of Article I, section 2 of the California Constitution that free speech activities cannot be prohibited in a large private shopping mall (Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899). According to the *Robins* court, such malls have supplanted central business districts as the essential public forum of a community. (*Id.*, at p. 910, fn. 5.) However, in so holding, the court emphasized the size of the mall (*id.*, at pp. 902, 910–911) and cautioned: "'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.'" (*Id.*, at p. 910.)

The present case does not involve either a shopping mall or a large retail establishment. In addition to the clinic, the medical building houses only a few medical offices and a pharmacy. The

parking lot in the rear of the building is restricted to tenants and their clients and visitors. The front of the building is less than 15 feet from the curb of the street.

In Allred v. Shawley (1991) 232 Cal.App.3d 1489, the court rejected a claim by abortion protestors that the parking lot of a 14,000 square foot office building with 10 tenants is a public forum. The building served mainly prearranged clients, was not fully open to the community, and did not provide services essential to all community members, such as would a mall or large grocery store. (*Id.*, at p. 1501.) In Planned Parenthood v. Wilson (1991) 234 Cal.App.3d 1662, where the court reached the same conclusion, the clinic location was described as follows: "The Medical Center's six tenants exclusively offer professional and personal services to specific clientele. It is for use only by individuals with specific business purposes, such as employees, clients and prospective clients of the tenants. The small off-street parking lot is designed to provide a convenient place to park for those having direct business with Medical Center tenants. Each parking spot is labeled for use by 'tenants' and 'patients,' and there is no space for public parking in general. Unlike a large shopping mall or historically recognized public forums like parks, streets or public sidewalks, the Medical Center in no way has acquired the attributes of a public forum." (*Id.*, at pp. 1671–1672.)

Defendants contend these cases are distinguishable because neither involved a facility housing a pharmacy open to the public. However, even though the pharmacy is open to the general public, we do not view this fact as changing the basic nature of the medical building as " 'a modest retail establishment' " (Robins v. Pruneyard Shopping Center, supra, 23 Cal.3d at p. 910), given the size of the building and parking lot involved. (Accord, Sunnyside v. Lopez (1988) 50 Wash. App. 786, 751 P.2d 313, 318.) The parking lot is private property, and the restriction against antiabortion activities therein is a reasonable limitation on defendants' free speech rights.

The injunction also prohibits antiabortion activities within a "speech free zone," encompassing a large portion of the sidewalk in front of the medical building.[4] Such areas as streets, sidewalks and parks historically have been viewed as "quintessential public forums" where free speech cannot be prohibited. (Perry Ed. Assn. v. Perry Local Ed. Assn. (1983) 460 U.S. 37, 45 [74 L.Ed.2d 794, 804]; Chico Feminist Women's Health Center v. Scully (1989) 208 Cal.App.3d 230, 244.) However, reasonable time, place and manner restrictions may be imposed where they (1) are content neutral, (2) are narrowly tailored to serve significant governmental interests, and (3) afford ample alternatives for communication. (*Ibid.*)

Assuming the area designated a speech free zone is a public forum, we find the foregoing requirements satisfied in this instance. The trial court indicated the locational restriction on defendants' activity was not based on the content of their speech but on the conduct involved, i.e., the obstruction of ingress and egress by physical blocking and harassment, and on the risk of harm to the clinic's patients. This is supported by substantial evidence. A restriction against activities within a given area is content neutral, as it makes no reference to the issues or viewpoints raised. (Accord, Portland Fem. Women's H. Ctr. v. Advocates for Life, Inc., supra, 859 F.2d at p. 686; Bering v. Share (1986) 106 Wash.2d 212, 721 P.2d 918, 925; but see Thomason v. Jernigan (E.D. Mich. 1991) 770 F.Supp. 1195, 1201.)

Two interests are served by exclusion from the speech free zone: the property rights of the clinic, and the privacy rights of the clinic patients. Regarding the latter, "[a]rticle I, section 1 of the California Constitution expressly make the pursuit and obtaining of privacy an 'inalienable right.' The state right of privacy protects

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[4] The trial court expressly excluded from the speech free zone a three-foot wide strip adjacent to the curb along the side of J Street, i.e., what might be considered the "sidewalk" parallel to the front of the clinic. (See Webster's Third New International Dictionary (1971) p. 2113; The Random House Dictionary of the English Language (1966) p. 1324 [a sidewalk generally is defined as a walk along the side of a road or street].)

information about a citizen's participation in a medical procedure, including abortion." (Chico Feminist Women's Health Center v. Scully, supra, 208 Cal.App.3d at p. 241.)

The presence of antiabortion activities directly in front of the clinic entrance can have a coercive effect on both patients and providers. Patients may be forced to seek assistance elsewhere or forgo the procedure altogether, while providers may be forced to discontinue abortion services because of continued harassment or pressure from building owners. In either event, the ability of a woman to effectuate her abortion decision would be compromised in violation of her rights.

Use of a speech free zone also is narrowly tailored to protect the patients' privacy interest. Defendants are not barred from the front of the building. A three-foot strip near the curb, a sufficient width for foot traffic, is available for their use. Any patient approaching the clinic from the front would be required to go either directly past or within a few feet of defendants. "While the court could possibly achieve its goal with a narrower free zone, we decline to entertain quibbling over a few feet." (Portland Fem. Women's H. Ctr. v. Advocates for Life, supra, 859 F.2d at p. 686.)

Ample alternatives for communication are preserved under the injunction. Defendants have not been exiled to a nonaccessible location. As previously indicated, patients approaching the front of the clinic must pass areas where defendants are permitted. Those approaching the rear of the clinic through the parking lot must pass the parking lot entrance, where defendants also are permitted. Defendants are allowed to protest and carry signs in plain view of those entering or within the clinic and are not precluded from distributing their materials to anyone willing to accept them. The restriction merely prohibits defendants from getting in the way of someone trying to avoid a confrontation.

Defendants contend creation of a speech free zone, in combination with the coercive conduct of clinic escorts, eliminates any rea-

sonable alternatives for communication. In support of this claim, defendants cite the testimony of Jay Baggett that escorts used such techniques as screening patients with umbrellas or signs, placing themselves between demonstrators and patients, taking prolife materials away from patients, using chants to drown out prolife messages, and intimidating demonstrators. However, much of this testimony conflicted with that of plaintiff's director of education, who indicated escorts were advised not to surround patients and were instructed to tell patients they could accept literature from antiabortion activists. It also conflicted with the testimony of plaintiff's escort coordinator who indicated she never tried to drown out antiabortionists or block them from patients. Implicit in the trial court's conclusion that reasonable alternatives were available is a finding that escort conduct did not interfere with these alternatives. This finding is supported by substantial evidence.

V

In a related argument, defendants contend the trial court erred in sustaining plaintiff's demurrers to the First Amendment claim in defendants' cross-complaint. They assert the conduct of plaintiff's escorts violated defendants' right to disseminate, and the patient's right to receive, antiabortion information.

Free speech provisions of the state and federal constitutions protect citizens from restrictions imposed by governmental action. Free speech concerns may be raised as a shield against injunctive relief only because the effectuation of such relief entails government action. (Accord Bering v. Share, supra, 721 P.2d at p. 925.) However, the same concerns cannot be used as a sword to obtain relief against a private party. Thus, defendants' contention has no merit.

Furthermore, even assuming defendants have standing to assert free speech rights of clinic patients and could state a claim for their deprivation, the trial court implicitly found that escort conduct did not interfere with defendants' ability to communicate their message. Defendants do not suggest the dismissal of their

First Amendment claim precluded admission of evidence of escort conduct. On the contrary, considerable testimony was received regarding such conduct.[5]

VI

Lastly, defendants challenge the award of attorney fees made pursuant to Code of Civil Procedure section 1021.5 (hereafter "section 1021.5"). They contend the award is not supported by the record and will have a chilling effect on their exercise of free speech rights protected by the First Amendment to the United States Constitution and article I, section 2 of the California Constitution.

Section 1021.5 codifies the "private attorney general" doctrine for awarding attorney fees. This doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." (Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 933.)

Where, as here, a plaintiff's action has not produced a monetary recovery, an award of attorney fees is proper under section 1021.5 if (1) the action has resulted in enforcement of an important right affecting the public interest, (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, and (3) the necessity and financial burden of private enforcement makes the award appropriate. (§ 1021.5; Woodland Hills Residents Assn., Inc. v. City Council, supra, 23 Cal.3d at pp. 934–935.)

The trial court found these elements were met. Its determination may not be disturbed on appeal absent a showing that the court

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[5] We will not consider defendants' vague allusion to an Unruh Civil Rights Act violation (Civ. Code, § 51, et seq.) arising from use of the speech free zone. No such claim was raised in or adjudicated by the trial court.

abused its discretion in awarding attorney fees, i.e., the record establishes there is no reasonable basis for the award. (Westside Community For Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355; Committee to Defend Reproductive Rights v. A Free Pregnancy Center (1991) 229 Cal.App.3d 633, 645.) "The pertinent question is whether the grounds given by the court for its [grant] of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of this case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute." (City of Sacramento v. Drew (1989) 207 Cal.App.3d 1287, 1298.)

Defendants do not dispute that this action resulted in the enforcement of an important right affecting the public interest and that a significant benefit has been conferred on the general public or a large class of persons. (Cf. Planned Parenthood v. Aakhus, (1993) 14 Cal.App.4th 162, 170–172.) Moreover, they do not dispute the necessity of private enforcement. Rather, defendants contend the financial burden of private enforcement in this instance does not warrant an award of attorney fees.

The "financial burden" criterion of section 1021.5 is met "when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' " (County of Inyo v. City of Los Angeles (1978) 78 Cal.App.3d 82, 89, quoted with approval in Woodland Hills Residents Assn., Inc. v. City Council, supra, 23 Cal.3d at p. 941.) This requirement "focuses not on [a plaintiff's] abstract personal stake, but on the financial incentives and burdens related to bringing suit. Indeed, in the absence of some concrete personal interest in the issue being litigated, the putative plaintiff would lack standing to bring an action." (Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 321, fn. 11.)

Defendants claim plaintiff had a sufficient financial interest in this litigation to preclude an award of attorney fees under section 1021.5. They argue the evidence "indicated that [plaintiff] took in $2.4 million from provision of medical services, most of which came from the Sacramento Clinic. . . . [¶] . . . Thus, the clinic receives a substantial benefit from funds collected for abortions. All the major [A]merican automakers have sustained recent losses, but their lawsuite [*sic*] are still brought and defended for financial reasons. The same rationale applied to plaintiff." The contention has no merit.

First, defendants overstate the financial benefit plaintiff receives from the medical services it provides.[6] The trial court found plaintiff's year-end surplus of revenues over liabilities for all of its clinics combined together amounted to only $11,914 in 1988, $15,000 in 1989 and $30,353 in 1990. In other words, the financial burden of litigation exceeded plaintiff's net income for a three-year period. Moreover, plaintiff is a nonprofit corporation operating four medical clinics in northern California, and its surpluses are used to subsidize its failing clinics, not to provide dividends for shareholders.

Second, the record establishes that plaintiff's primary motive in pursuing this action was not to protect its personal financial interest, but was to ensure its ability to continue providing medical and abortion services to women. Plaintiff did not seek to recover lost revenues, it sought relief in a representative capacity on behalf of women attempting to obtain abortion services at its clinic. Because defendants' actions were directed at preventing women from obtaining abortions by obstructing them from getting out of their cars, by impeding their progress toward the clinic, and by blocking or otherwise interfering with the entrances to the clinic and the parking lot, plaintiff sought an injunction to protect its

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[6] The dissent also exaggerates this factor.

patient's right to abortion by ensuring that their access to abortion was not restricted unlawfully.[7]

Therefore, this is not a case of a litigant which is motivated solely by its own pecuniary interests and only coincidentally protects the public interest. (See Angelheart v. City of Burbank (1991) 232 Cal.App.3d 460, 470; Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 114.) As stated recently in Planned Parenthood v. Aakhus, a factually similar case which upheld an award of attorney fees under section 1021.5, "the interests of [plaintiff] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable. This action was brought to protect both [plaintiff] and its patrons; consequently, it cannot be exclusively characterized as a self-serving, private dispute commenced by [plaintiff] to protect its own pocketbook." (14 Cal.App.4th at p. 173.)

Because there is a reasonable basis in the record for the trial court's determination on the "financial burden" criterion, the court did not abuse its discretion in ordering defendants Jay Baggett, Don Blythe, Murray Lewis, Theresa Marie Reali, and John Stoos to pay plaintiff's attorney fees pursuant to section 1021.5.

There is no merit in these defendants' contention that the attorney fee award should not be assessed against them because they are private individuals. Their status as private parties does not pre-

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[7] Claiming "the injunctive decree hardly represents a 'ringing declaration' of the right of women to an abortion," the dissent views the matter as nothing more than a business owner's enforcement of its right to the beneficial use of its business premises. Noting that defendant's activities threatened plaintiff's ability to meet its operating expenses, the dissent concludes plaintiff merely was defending its very existence. However, plaintiff was not defending its existence solely for a profit motive. Where an abortion provider is forced, directly or indirectly, to discontinue abortion services because of continued harassment, the ability of a woman to effectuate her abortion decision is compromised in violation of her rights. Without access to an abortion, the right to abortion is illusory. Plaintiff recognized this and explicitly sought injunctive relief to ensure that its patients had the continuing ability to obtain medical and abortion services.

clude an award of attorney fees. (Planned Parenthood v. Aakhus, supra, 14 Cal.App.4th at p. 175; County of Fresno v. Lehman (1991) 229 Cal.App.3d 340, 349; Braude v. Automobile Club of Southern Cal. (1986) 178 Cal.App.3d 994, 1011; Franzblau v. Monardo (1980) 108 Cal.App.3d 522, 529-530.)

Defendants' claim that an award of attorney fees would operate to chill their rights to free speech also is unavailing because, as we shall explain, defendants' conduct unquestionably exceeded the protection afforded by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution, and interfered with the exercise by others of the constitutional right to abortion. (Planned Parenthood v. Wilson (1991) 234 Cal.App.3d 1662, 1670-1674; Allred v. Shawley, supra, 232 Cal.App.3d at pp. 1501-1505; see also Planned Parenthood v. Aakhus, supra, 14 Cal.App.4th at p. 175; Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S. (E.D. Cal. 1983) 557 F.Supp. 1190, 1202-1204.) "'[T]he First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech, also protects [plaintiff's] right to abortion services and the patients' rights to receive those services.'" (Northeast Women's Center, Inc. v. McMonagle (3rd Cir. 1989) 868 F.2d 1342, 1349, citation omitted.)

As discussed previously, defendants obstructed access to the medical building and parking lot. "[B]locking access to public and private buildings has never been upheld as a proper method of communication in an orderly society." (N.Y. State Nat. Organization for Women v. Terry (2nd Cir. 1989) 886 F.2d 1339, 1364.) Defendants also attempted to prevent clients from getting out of their cars by standing in front of car doors. At other times, defendants would position themselves so that when a patient got out of her car she was pinned between her car and the adjacent vehicle. Once a patient was able to leave her vehicle, defendants' efforts to frustrate the patient's effort to get to the clinic continued. As one patient explained, "Every time I tried to get around [a demonstrator], he would get in front of me . . . making it hard for me to get

in." After patients indicated a lack of interest in the demonstrators' views and expressed a wish to be left alone, defendants continued to thrust literature at them, yell at the patients, and even chase some of them down the sidewalk. On one occasion, defendant Baggett thrust a sign in a patient's face and would have hit her in the head if she had not moved out of the way. On another occasion, defendant Reali, who was inside the building, chased and thrust antiabortion literature at a tearful woman. Furthermore, defendant Blythe assaulted escorts who were attempting to assist women in gaining access to the clinic.

Plaintiff sought the injunction due to this type of conduct. According to plaintiff's executive director and the clinic administrator, although the picketing had been going on for a year, court action was not pursued until defendants aggressively harassed women seeking abortion services and actually came into the building. After the temporary restraining order issued, and again after the preliminary injunction was granted, plaintiff attempted to settle this matter. Plaintiff offered to stipulate to making the injunction permanent so as to avoid the necessity and cost of trial and, in return, to modify the injunction to make it less objectionable to defendants. When plaintiff's efforts were unsuccessful, the matter went to trial. The relief granted in the permanent injunction was not significantly different than that granted in the preliminary injunction, including the exclusion of defendants from the parking lot.

Consequently, the attorney fees incurred by plaintiff were necessitated by defendants' refusal to limit their conduct to that protected by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution. If defendants had not engaged in unprotected conduct, plaintiff would not have initiated this action and, thus, would not have incurred the attorney fees in question.

The attorney fee award does not operate to chill defendants' rights to freedom of speech because it does not prevent them from continuing to demonstrate and exercise their free speech rights

within the lawful limits set forth in the injunction. No legitimate claim can be made that the attorney fee award punishes defendants after the fact for conduct they did not know was beyond the protected realm of the freedom of speech and, therefore, defendants and others will be inhibited in the future exercise of their freedom of speech for fear of being "penalized" again. Even the most naive person would have known defendants' conduct—blocking or impeding access to a lawful enterprise and engaging in acts of assault and harassment to prevent women who had expressed disinterest in defendants' views from exercising the constitutional right to abortion—is not absolved by invoking the protections afforded by the First Amendment and article I, section 2. When a person oversteps the bounds of protected speech, civil and criminal liability may attach.. (Northeast Women's Center, Inc. v. McMonagle, supra, 868 F.2d at pp. 1348-1350; cf. Radiche v. Goode (3rd Cir. 1989) 886 F.2d 1391, 1398.)

The dissent asserts the attorney fee award is infirm because the trial court "[did] not parse out the legal from the illegal conduct or fix the responsibility individually for illegal acts and the proportionate impact of illegal conduct on plaintiff's litigation costs." (Dissent at pp. 12-13.)

However, defendants do not attack the attorney fee order on this basis. Moreover, NAACP v. Claiborne Hardware Co. (1982) 458 U.S. 886 [73 L.Ed.2d 1215], upon which the dissent relies, is inapposite. In that case, black persons seeking to achieve racial justice were sued in state court for acting in concert to boycott a number of white merchants. The boycott generally was peaceful and orderly. No arrests were made and no complaints were received in connection with the defendants' picketing. However, some threats of violence and acts of violence were committed by some of the defendants against people not honoring the boycott. (*Id.*, at pp. 903-905 [73 L.Ed.2d at pp. 1229-1231].) Even though only some of the defendants had resorted to violence and unlawful conduct, the Mississippi Supreme Court concluded the entire boycott was unlawful and upheld the trial court's imposition of liability

for the merchant's business losses on the ground the defendants maliciously interfered with the merchants' business. (*Id.*, at pp. 894, 895 [73 L.Ed.2d at p. 1224].) In addition, the defendants were enjoined from picketing the merchants' premises and from persuading people to withhold their patronage from the merchants' businesses. (*Id.*, at p. 893 [73 L.Ed.2d at p. 1224].) The United States Supreme Court reversed the judgment, holding the First Amendment protected the nonviolent elements of the boycott (*id.*, at pp. 915, 934 [73 L.Ed.2d at pp. 1237, 1249]), the state could not prohibit peaceful political activity (*id.*, at p. 913 [73 L.Ed.2d at p. 1236]), and the state court could not hold all the boycott participants liable for all the merchants' damages merely because some of the participants engaged in violence, especially where it was not established that all of the damages were attributable to the unprotected, violent activity (*id.*, at pp. 921–923 [73 L.Ed.2d at pp. 1241–1242]). The court stated: "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." (*Id.*, at p. 918 [73 L.Ed.2d at p. 1240].) Hence, only those defendants who engaged in unprotected, violent conduct were responsible for the damages and only to the extent the damages were caused by their unlawful conduct. (*Id.*, at pp. 926, 933 [73 L.Ed.2d at p. 1244, 1249].)

Here, unlike in NAACP v. Claiborne Hardware Co., plaintiff commenced this action to enjoin defendants' unlawful and unprotected conduct, the injunction granted was proper, and all of the defendants engaged in the unprotected activities which caused plaintiff to seek the injunction. Because plaintiff was compelled to retain counsel to secure an order enjoining *unprotected conduct engaged in by all of the defendants*, it is proper to hold all of them accountable for plaintiff's attorney fees.[8]

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[8] We recognize that a trial court has discretion to apportion a section 1021.5 attorney fee award based upon the relative culpability of the defendants. (Californians for Responsible Toxics Management v. Kizer (1989) 211 Cal.App.3d 961, 976; Washburn v. City of Berkeley (1987) 195 Cal.App.3d 578, 592–593; Sundance v. Municipal Court (1987) 192 Cal.App.3d 268, 272.) How-

The dissent offers yet another basis, not advanced by defendants, to overturn the attorney fee award. Stating that union members picketing their employers' businesses frequently have been enjoined from related conduct which unduly infringes on the employers' property rights, the dissent suggests there are no cases which have required individual union members to pay attorney fees incurred by the businesses in obtaining the injunctions. Implying there are no such cases because the picketers were exercising their First Amendment rights, the dissent asserts, by analogy, that attorney fees should not be awarded in the present case. (Dissent at pp. 8–9.) We are unpersuaded. Ordinarily, attorney fees pursuant to Code of Civil Procedure section 1021.5 would not be warranted in an action to enjoin certain conduct of union members picketing their employer's business, even if the picketers' conduct included actions unprotected by the First Amendment. This is so because (1) injunctions obtained by employers do not necessarily confer a significant benefit upon the general public or a large class of persons, and (2) if employers champion only their individual property rights, the financial burden of litigation would not outweigh their personal stake in the matter. Hence, the analogy invoked by the dissent is inapposite.

In their reply brief, defendants argue the attorney fee award should be reversed due to the fact that some of the litigation expenses were incurred by plaintiff's seeking an impermissible line of

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ever, in this case the trial court was not asked to apportion the attorney fee award among the defendants. Accordingly, it cannot be said the trial court abused its discretion by failing to order an apportionment. Moreover, plaintiff theorized that defendants were "acting in concert" with the other demonstrators in a concerted effort to obstruct patient access to plaintiff's abortion services. There is evidence to support such an inference. For example, evidence suggested that defendants Baggett, Blythe and Lewis exercised leadership roles in the demonstrations and that Baggett, Blythe, Lewis and Stoos welcomed the assistance of Operation Rescue. By ruling the defendants are jointly and severally liable for the attorney fee award, the trial court appears to have concluded that they were equally culpable of the unprotected conduct which gave rise to the attorney fee award and that none of them engaged in a lesser role which would have justified apportionment of the fee award.

sight restriction and because defendants believed they had a constitutional right to conduct their activities in the parking lot and on the sidewalk. Defendants note that Allred v. Shawley, supra, 232 Cal.App.3d 1489 and Planned Parenthood v. Wilson, supra, 234 Cal.App.3d 1662, which held that parking lots similar to plaintiff's are not public or quasi-public forums, were not decided until after the trial in this case was completed. Thus, according to defendants, their "options were to be intimidated by fear of attorneys [*sic*] fees into abandoning what were, at the time, established constitutional rights, and stipulating to a line of sight restriction, or to risk losing their life savings."

Generally, points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before. (Neighbours v. Buzz Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8.) Defendants have failed to establish good cause for their omission. In any event, defendants' contention is unpersuasive for two reasons.

First, the activities engaged in by defendants were not "at the time, established constitutional rights." Defendants cite no cases holding that private property similar to plaintiff's parking lot is a public forum which must be made available for the exercise of free speech rights. This is understandable because pertinent cases indicate the contrary. The First Amendment to the United States Constitution does not give individuals an unqualified right to engage in free expression and assembly on private property. (Lloyd Corp. v. Tanner, supra, 407 U.S. at pp. 567-570, [33 L.Ed.2d at pp. 142-143]; Hudgens v. NLRB, supra, 424 U.S. at pp. 516-521 [47 L.Ed.2d at pp. 204-207].) Under limited circumstances, people are entitled to exercise First Amendment rights on private property which has assumed all of the characteristics of a municipality and has been devoted sufficiently to public use, a circumstance which plainly is not present in this case. (*Ibid.*; Marsh v. Alabama (1946) 326 U.S. 501, 506-507 [90 L.Ed. 265, 268-269].) The California Constitution is more definitive and inclusive than the First Amendment in protecting expression. (Robins v.

Pruneyard Shopping Center, supra, 23 Cal.3d at pp. 908-909.) As noted in part IV, *ante*, *Robins* held that California's Constitution independently protects speech and petitioning rights reasonably exercised in large, privately owned shopping centers because such malls have supplanted central business districts as essential public forums of a community. (*Id.*, at p. 910, fn. 5.) However, the court emphasized the size of the mall (*id.*, at pp. 902, 910-911) and cautioned: " 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.' " (*Id.*, at p. 910, citation omitted.) In other words, *Robins* did not hold that a parking lot that is adjacent to a small medical building and has signs posted restricting its use to tenants and clients is a public forum. In fact, *Robins* intimated that such a modest establishment is *not* a public forum.

Accordingly, at the time of the demonstrations, there was no case law which would have led defendants to believe they had a constitutional right to ignore the signs posted on plaintiff's parking lot—warning that the parking lot was reserved for use of tenants and customers and that trespassers would be prosecuted—and to enter onto the parking lot in an effort to convey their antiabortion message.

Moreover, even if they honestly thought the parking lot was a quasi-public forum, defendants had absolutely no basis to believe they had a constitutional right to enter the lot to interfere with the conduct of plaintiff's business and use of the property, to impede the movement of customers or business tenants, to block access, to create noisy disturbances or to harass uninterested patrons. (In re Hoffman, supra, 67 Cal.2d at pp. 851-852.)

Second, the fact that plaintiff did not prevail in its attempt to increase the speech free zone to an area within the line of sight of the front and rear entrances to the medical building does not undermine the attorney fee award. Despite defendants' request that the trial court reduce the attorney fee award based upon plaintiff's

failure to prevail on the so-called "line of sight" restriction, the trial court declined to do so. We find no abuse of discretion. (Sundance v. Municipal Court, supra, 192 Cal.App.3d at p. 274.) The record discloses plaintiff did not avidly pursue a line of sight restriction. In fact, plaintiff indicated it readily would accept a 20-foot speech free zone. In its trial brief, plaintiff even suggested the court "put the picketers where the women can see them and voluntarily approach them if interested (away from the front of the building)." Under the circumstances, the trial court reasonably could have concluded that an insignificant portion of plaintiff's attorney fees were expended in litigating a line of sight restriction.

A reduced fee award is appropriate when a claimant achieves only limited success. (Sokolow v. County of San Mateo (1989) 213 Cal.App.3d 231, 249.) Here, plaintiff got virtually all it asked for. Hence, the trial court did not err in awarding plaintiff full compensation for its attorney fees.[9]

Although we shall affirm the order as to defendants Baggett, Blythe, Lewis, Reali, and Stoos, we will reverse the attorney fee

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[9] Although not controlling, federal precedent is of analogous precedential value. (Serrano v. Unruh (1982) 32 Cal.3d 621, 639, fn. 29; Sokolow v. County of San Mateo, supra, 213 Cal.App.3d at p. 249.) According to the United States Supreme Court, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . . [¶] If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . [T]he most critical factor is the degree of success obtained." (Hensley v. Eckerhart (1983) 461 U.S. 424, 435-436 [76 L.Ed.2d 40, 52].) The trial court has discretion in determining the amount of a fee award. (*Id.*, at p. 437 [76 L.Ed.2d at p. 53].) As we have indicated, because plaintiff obtained "excellent results" in that it obtained the vast majority of the relief requested in its complaint, the trial court did not abuse its discretion in awarding full compensation.

award as to defendants John Walker and Operation Rescue. They contend correctly that they may not be held liable for plaintiff's attorney fees because an award of such fees is precluded by Code of Civil Procedure section 580.

Walker and Operation Rescue did not file answers to plaintiff's complaint, and defaults were entered accordingly. Code of Civil Procedure section 580 provides: "*The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint*; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." (Emphasis added.)

Code of Civil Procedure section 580 repeatedly has been interpreted in accordance with its plain language. A trial court has no jurisdiction to grant a plaintiff more relief against a defaulting defendant than is asked for in the complaint. (In re Marriage of Lippel (1990) 51 Cal.3d 1160, 1166–1167; Greenup v. Rodman (1986) 42 Cal.3d 822, 826; Becker v. S.P.V. Construction Co. (1980) 27 Cal.3d 489, 493.)

Plaintiff's complaint does not contain any allegations concerning attorney fees, nor does it demand such fees. If plaintiff believed it was entitled by statute to attorney fees, it had to allege that fact in its complaint and demand the fees in the prayer in order to obtain such relief against any defaulting defendants. (Becker v. S.P.V. Construction Co., supra, 27 Cal.3d at p. 495; Wiley v. Rhodes (1990) 223 Cal.App.3d 1470, 1474.) It also is noteworthy that plaintiff failed to request attorney fees as costs in its requests to enter default. (*Wiley, supra*, at p. 1474, fn. 5.)

Plaintiff contends the award was proper because a request for attorney fees under section 1021.5 need not be made until after the judgment is final. Ordinarily, this is true. (Stebbins v. Gonzales (1992) 3 Cal.App.4th 1138, 1146; Angelheart v. City of Burbank, supra, 232 Cal.App.3d at p. 466; Citizens Against Rent Control v. City of Berkeley (1986) 181 Cal.App.3d 213, 226–227; see also Washburn v. City of Berkeley (1987) 195 Cal.App.3d 578, 583.)

However, the aforesaid cases do not involve defendants against whom defaults were entered. Hence, those cases are governed by the latter half of Code of Civil Procedure section 580, which provides that in any case where an answer has been filed "the Court may grant [the plaintiff] any relief consistent with the case made by the complaint and embraced within the issue."

Plaintiff has cited no cases holding that an award of attorney fees under section 1021.5 is proper against a defaulting defendant where a demand for such fees was not included in the complaint, and our research has disclosed none. Accordingly, plaintiff is constrained by the plain and unambiguous mandate of Code of Civil Procedure section 580: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; . . ."

Because plaintiff did not demand attorney fees in its complaint, the court did not have jurisdiction to award such fees against defendants Walker and Operation Rescue. In light of this conclusion, it is unnecessary to consider the additional challenges raised by Walker and Operation Rescue, i.e., that attorney fees may not be awarded because the judgment did not grant plaintiff any relief against them, or that they may not be held liable for fees incurred after their defaults were entered. In addition, we need not address Operation Rescue's challenge to service of process as a basis for reversing the attorney fee award as to Operation Rescue.

DISPOSITION

The attorney fee order is reversed as to defendants Walker and Operation Rescue. In all other respects, the judgment and attorney fee order are affirmed. Defendants Blythe, Lewis, Reali, Baggett and Stoos shall pay plaintiff's costs on appeal. Plaintiff shall pay the costs on appeal of defendants Walker and Operation Rescue.

SCOTLAND, J.

I concur:
RAYE, J.

I concur in the opinion of the court to the extent it affirms the judgment granting plaintiff a permanent injunction and reverses the order awarding plaintiff attorney fees as against defendants John Walker and Operation Rescue. I dissent from the affirmance of the trial court's order awarding plaintiff attorney fees against the answering defendants.

Defendants attack the order for attorney fees on two grounds: (1) plaintiff failed to establish the financial burden of private enforcement is disproportionately greater than its stake in the litigation and (2) the award of attorney fees in these circumstances unconstitutionally burdens defendants' rights of free speech. I agree the order is infirm on both grounds.

I

Code of Civil Procedure section 1021.5 permits the award of attorney fees to a successful party in any action resulting in "the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Defendants contend the plaintiff failed to establish that the financial burden of private enforcement warrants an award of attorney fees. I agree. Despite being a nonprofit organization, plaintiff's operations are significant, with four clinics in Northern California. In 1990, plaintiff had a budget of $2.4 million. Plaintiff receives its operating income from fundraising and fees for services rendered, with the greater portion coming from the latter. Fees range anywhere from $10 for minor services to $295 for an abortion. In 1988 plaintiff received $1,427,746 in fees. In 1989 the amount was $1,865,440 and in 1990 it was $2,346,891.

In 1988 the clinic saw 2500 patients. This number grew to 3500 in 1989, and to 6000 in 1990. Of the 6000 patients seen

in 1990, 2500 to 3000 had abortions performed. Due to the conduct of picketers, attendance of patients at the clinic on Saturdays dropped by as much as 50 percent. According to Shauna Heckert, the clinic's administrator, patients "would want to change to a different facility." Because a substantial number of patients who needed the clinic's services obtained them elsewhere, plaintiff asserts the picketing caused it "a tremendous financial loss."

"The financial burden of private enforcement requirement means that an award of attorney fees under section 1021.5 . . . is only appropriate when the cost of the claimant's legal victory transcends his or her personal interest—i.e., when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter. ([Citation.]" (Luck v. Southern Pacific Transportation Co. (1990) 218 Cal.App.3d 1, 30.)

Plaintiff was defending its very existence as a fee for service entity. As plaintiff's customers fell off because of defendants' activities, plaintiff's ability to meet operating expenses was threatened. Given the size of plaintiff's operations and its annual revenue, a $99,000 legal bill is not out of proportion to plaintiff's stake in the litigation.

Although the relief granted vindicated plaintiff's interest in the controversy, the injunctive decree hardly represents a "ringing declaration" of the right of women to an abortion. (See Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 167.) The decree simply insures undisturbed access to plaintiff's facility of fee paying customers who choose to patronize plaintiff's clinic rather than some other similar facility. Its effect is no different than an injunction against union members picketing their employer's business in a labor dispute. In such cases, the injunction allows the employer to continue the beneficial use of its business premises. The fact that the injunction also frequently enables non-striking employees who are strangers to the litigation to resume the pursuit of their livelihoods is simply an incidental effect.

The claimant bears the burden of establishing its litigation costs are out of proportion to its personal stake in the matter. (Beach Colony II v. California Coastal Com. (1985) 166 Cal.App.3d 106, 113.) Plaintiff did not meet this burden.

II

Defendants renew their trial court contention that the attorney fees award chills the exercise of their First Amendment rights. Again, I agree.

"[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' Carey v. Brown, 447 U.S. 455, 467, 65 L.Ed.2d 263, 100 S.Ct. 2286. '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Garrison v. Louisiana, 379 U.S. 65, 74–75, 13 L.Ed.2d 125, 85 S.Ct. 209. There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412." Thus spoke the United States Supreme Court in N.A.A.C.P. v. Claiborne Hardware Co. (1982) 485 U.S. 886, 913 [73 L.Ed.2d 1215, 1236].

In their activities at plaintiff's abortion clinic, defendants expressed their views on a national controversy that has deeply divided the country. To say that the manner of expression was robust and uninhibited understates the case. Indeed, it was strident, accusatory and confrontational. "Strong and effective extemporaneous rhetoric cannot be channeled in purely dulcet phrases." (N.A.A.C.P. v. Claiborne Hardware Co., supra, 485 U.S. at 928 [73 L.Ed.2d at 1246].) Nevertheless, the defendants' message was well within the bounds of constitutionally protected speech. For example, defendants shouted "murder, murder, murder," at women entering the clinic, and implored them not to "kill" their babies. Representative of the messages on the signs and posters displayed by defendants were these: "Abortion Kills Babies, Stop the Holocaust"; "Abortion, the Ultimate Child Abuse"; "Dr. Bruce

Steir Butchers Babies Here"; "[Shauna] Heckert's Baby Hackery"; "Abortion, An Act of Raw Power."[1]

Defendants, or at least some of them, also engaged in activities that are not constitutionally protected or otherwise privileged. For example they at times blocked ingress to the building and the parking lot and impeded patients and others attempting to approach and enter the clinic. But it grossly distorts the record to suggest that defendants' activities involved a continuous, unbroken series of illegal acts unrelieved by the pristine exercise of free expression. In fact, it is the latter, constitutionally protected activity that predominated and thus more accurately characterizes defendants' activities.[2]

By their conduct, defendants demonstrated their passionate devotion to what is commonly known as the pro-life cause. While I do not condone the unlawful excesses by which defendants' fervor sometimes manifested itself, I do not doubt that defendants' un-

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[1] The latter message appears to be a send-up of Justice White's dissent in Roe v. Wade (1973) 410 U.S. 113 [35 L.Ed.2d 147]. Justice White excoriated the Roe v. Wade majority for its "exercise of raw judicial power" in "fashion[ing] and announc[ing] a new constitutional right for pregnant mothers" without support "in the language or history of the constitution." (Roe v. Wade at 410 U.S. at 222-223 [35 L.Ed.2d at 195-196; dis. opn. of White].)

[2] Perpetrators of violence can claim no sanctuary in the First Amendment no matter how pure or well intentioned their motives or their message. While there is evidence of physical contact between some of the defendants and some of plaintiff's employees and patients, it was confined to bumping, shoving and blocking and, as the trial court found, was engaged in by partisans on both sides of this controversy. Defendants had no right forcibly to commandeer an audience to hear their message nor to impede access to plaintiff's clinic, and plaintiff and its agents had no right forcibly to interfere with defendants' attempts peacefully to communicate. By enjoining defendants from conducting their activities in specified areas adjacent to the clinic, the trial court sought to foreclose any repetition of this conduct. While I do not condone this conduct in any circumstances, given the numbers of persons involved and the period of months in which the protest activities took place, the incidence of, and level of force used in such physical encounters hardly justify the extravagant characterization of defendants' activities as "violent."

derlying purpose was to protest activity which, according to their understanding, was violative of natural law, even though that activity has been expressly sanctioned by the highest judicial tribunal in the land. That is political speech pure and simple, and when lawfully expressed, is entitled to constitutional protection.

Speech and conduct cannot neatly be separated. Indeed, it is difficult to imagine how speech can be an effective vehicle for communication of ideas unaided by conduct of some kind. The precise line between conduct protected as a necessary adjunct to free expression and conduct which cannot claim that protection is not a bright one. It can be ascertained only by a delicate balancing of the competing rights at stake in concrete factual circumstances.

Because defendants' exercise of free expression collided with plaintiff's right to engage in lawful activity on its property, defendants' freedom of expression could be restricted as to time, place and manner. In this case, the court carefully weighed and considered the evidence and issued a decree which strikes an appropriate balance between the competing interests. Defendants were enjoined from conduct which directly interfered with plaintiff's conduct of lawful activity on its business premises. On the other hand, recognizing the constitutional sanctity of free expression, the court rejected plaintiff's demand that defendants be precluded from demonstrating in the immediate vicinity of the clinic, i.e., at any location in which their activities could be observed from within the clinic.

Viewed in the historical context of First Amendment litigation, there is nothing particularly remarkable about this dispute or its resolution by the trial court. The exercise of free expression through demonstrations and picketing has a venerable history in the political life of our democracy and has played a vital role in influencing public policy. Yet on countless occasions courts have been called upon to rein in demonstrators and picketers whose passion and exuberance in furtherance of their causes has trenched upon the

rights of others to engage in lawful activities. For example, union members who broadcast their views in a labor dispute by picketing their employer's business frequently have been enjoined from conduct that unduly infringes upon the employer's property rights. And, as in this case, such conduct has often had the incidental effect of interfering with the constitutional rights of third parties. Thus in labor union-employer disputes, picketers frequently prevent nonstriking employees from pursuing their livelihoods. (See Meyer v. Nebraska (1923) 262 U.S. 390, 399 [67 L.Ed. 1042, 1045] cited with approval in Planned Parenthood v. Casey (1992) 505 U.S. _____ [120 L.Ed.2d 674, 696]. If in those injunction proceedings individual union members (as distinct from the union itself) have been held personally liable for the employer's attorney fees it has escaped my notice and I would be astounded if it were to be allowed.[3]

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[3] Unlike abortion rights, property rights and free speech rights enjoy express protection from government infringement in the federal Constitution. Property rights are protected expressly by Amendments V & XIV and implicitly by Amendments II, III and IV. Free speech rights are protected expressly by Amendment I. In contrast, the constitutional right to an abortion derives either from "penumbras formed by emanations from" the specific guarantees of the Bill of Rights (Griswold v. Connecticut (1965) 381 U.S. 479, 484 [14 L.Ed.2d 510, 514]; Roe v. Wade, supra, 410 U.S. 113, 152–153 [35 L.Ed.2d 147, 176–177]) or is subsumed within the "heart of [the] liberty [interest] protected by the Fourteenth Amendment," an interest which, we are told, particularly protects the right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (Planned Parenthood v. Casey (1992) 505 U.S. _____ [120 L.Ed.2d 674, 698].) In time, perhaps, a less vaporous constitutional theory for abortion rights may be divined by jurists even more adept at creative construction, but we must accept the existing handiwork of our judicial betters, unconvincing though it may be. In any event, whatever may be the constitutional provenance of the right to an abortion, the right is not superior to other constitutionally protected rights such as free speech, property rights and the fundamental right to pursue one's livelihood which is also protected as a function of substantive due process (see Meyer v. Nebraska, supra). The notion implicit in the canon of many supporters of abortion rights that the right to an abortion trumps all other constitutional rights is simply a faddish conceit. In this case, of course, plaintiff does not contend that government is unconstitutionally trenching on its property rights or on the rights of plaintiff's clients to an abortion. However, defendants do contend government is infringing upon

In N.A.A.C.P. v. Claiborne Hardware Co., supra, the defendants, black persons seeking to achieve racial justice, were sued in state court for acting in concert to boycott a number of white merchants. The boycott was marred by a number of illegal acts. The United States Supreme Court characterized it as "chameleon-like . . . includ[ing] elements of criminality and elements of majesty." (485 U.S. at 888 [73 L.Ed.2d at 1221].) The Supreme Court reversed a joint and several judgment against defendants and in favor of the white merchants for injunctive relief and damages for business losses due to the boycott plus attorney fees. The court held the nonviolent activities of defendants are entitled to First Amendment protection. (485 U.S. at 915 [73 L.Ed.2d at 1237].) "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately cause by unlawful conduct may be recovered." (485 U.S. at 918 [73 L.Ed.2d at 1240].) "'In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 [5 L.Ed.2d 231, 81 S.Ct. 247] (1960).' Carroll v. Princess Anne, 393 U.S. 175, 183–184, 21 L.Ed.2d 325, 89 S.Ct. 347." (485 U.S. at 920 [73 L.Ed.2d at 1241].)

The court explained: "At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, [defendants'] ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

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their protected free speech rights by virtue of the judgment against them for plaintiff's attorney fees.

"The taint of violence colored the conduct of some of the [defendants]. They, of course, may be held liable for the consequences of their violent deeds. *The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy.* A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the [state trial judge] . . . are constitutionally insufficient to support the judgment that [defendants] are liable for all losses resulting from the boycott." (485 U.S. at 933, 934 [73 L.Ed.2d at 1249] emphasis added.)

In respect to the joint and several judgment against defendants for plaintiff's attorney fees, the facts here are closely analogous to those in *Claiborne*. A monetary award for attorney fees has no less a chilling effect on the exercise of First Amendment rights than if the award were denominated one for compensatory damages. Such a distinction would be utterly sophistical. The exaction of money from defendants will burden them with the same baleful economic consequences no matter the label on the judgment. Moreover, notwithstanding the illegal acts of some of the defendants some of the time, defendants' primary purpose was to communicate their views on a highly controversial issue of great public interest and concern. Most of defendants' activities in furtherance of that purpose were lawful and thus constitutionally pro-

tected. The trial court's findings do not parse out the legal from the illegal conduct or fix the responsibility individually for illegal acts and the proportionate impact of illegal conduct on plaintiff's litigation costs.[4] Conversely, the trial court made no finding on the extent to which plaintiff's litigation costs were increased by the unsuccessful effort to limit defendants' picketing activities to areas further removed from the clinic, relief which the trial court refused presumably because it would be an unreasonable restriction on defendants' constitutionally protected rights of free expression. The record simply will not support a monetary judgment against defendants the inevitable consequence of which will be to stifle the exercise of First Amendment rights not only by defendants but by all others who in future will forswear their rights because they cannot afford financial penalties much less financial ruin as the price of exercising constitutionally guaranteed rights.[5]

By "constitutionalizing" the right to abortion the highest court in the land has preempted any policy making role by the political branches of government in respect to abortion. Citizens dissatisfied with public policy governing abortion can no longer look to their legislators for change. But the high court did not *and could not* foreclose further political debate on the subject. This is, after all, the United States of America, not the "Evil Empire." What the high court did do, however, is to constitute the streets the primary,

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[4] The majority implies defendants have waived any claim the trial court erred in failing to distinguish between constitutionally protected and unprotected conduct in assessing attorney fees. (See, e.g., typed opn. fn. 8 at pp. 40–41.) From the outset defendants have maintained that fixing them with liability for attorney fees would chill their rights of free speech because their conduct was constitutionally protected. It is clear from the record that a good deal of their conduct was constitutionally protected and the fact that, contrary to defendants' contention, some was not hardly operates to forfeit their claim to constitutional protection in its entirety.

[5] In opposition to plaintiff's request for attorney fees, defendants filed declarations of their financial status showing that they are people of very modest resources. In responding points and authorities plaintiff airily dismissed these declarations as "verbal garbage." Defendants' declarations stand uncontradicted.

if not the only, forum for that debate. Debate in the forum of the streets lacks the orderliness and civility of the legislative forum to which citizens could otherwise repair to influence public policy. Street debaters are not governed by Robert's Rules of Order. Given these realities, we should not be "slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which [its guarantees] might be stifled." (N.A.A.C.P. v. Claiborne Hardware Co., supra, 485 U.S. at 932 [73 L.Ed.2d at 1248].)

I would reverse the judgment for attorney fees in its entirety.

Puglia, P.J.

APPENDIX O

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Sacramento County)

C011874

FEMINIST WOMEN'S HEALTH CENTER,

Plaintiff, Cross-Defendant and Respondent,

v.

DON BLYTHE, *et al.*,

Defendants, Cross-Complainants and Appellants.

MODIFICATION OF OPINION AND DENIAL OF REHEARING

[Filed Sep. 20, 1993]

APPEAL from an order of the Superior Court of Sacramento County, James L. Long, Judge. Reversed in part, affirmed in part.

Michael D. Imfeld, Mike Millen, and David L. Llewellyn, Attorneys for Defendants, Cross-Complainants and Appellants.

Mark E. Merin, Dickstein & Merin, and Fred J. Hiestand for Plaintiff, Cross-Defendant and Respondent.

THE COURT:

It is ordered that the opinion filed herein on August 19, 1993, be modified in the following particulars:

1. On page 2, lines 9–12 of footnote 1 [App. 107a]; delete the last sentence which begins with the word "Accordingly"

2. On page 3, line 11 [App. 108a]; strike "blocking" and add instead "obstructing" so the line reads "would have known defendants' conduct—obstructing access to the"

3. On page 15, line 7 [App. 116a]: after "numbers.'" add the following sentence, "No further specification is necessary." so the line reads "numbers.' No further specification is necessary."

4. On page 15, lines 8–10 [App. 116a]: delete the paragraph which reads, "A finding that 'defendants and others' engaged in the indicated conduct necessarily implies all defendants committed all the acts enumerated. No further specification is necessary."

5. On page 36, lines 8 through 11 [App. 130a]: delete the sentence which reads, "As one patient explained, 'Every time I tried to get around [a demonstrator], he would get in front of me . . . making it hard for me to get in.'"

6. On page 38, line 7 [App. 132a]: strike "blocking or impeding" and add instead "obstructing" so the line reads, "known defendants' conduct—obstructing access to a"

This modification does not affect the judgment.

The petition for rehearing is denied.

THE COURT:

PUGLIA, P.J.
SCOTLAND, J.
RAYE, J.

APPENDIX P

Third Appellate District No. C011874
S035226

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FEMINIST WOMEN'S HEALTH CENTER,

Respondent

v.

DON BLYTHE *Et Al.*,

Appellants

[Filed Nov. 10, 1993]

Appellants' petition for review DENIED.

Panelli, J. is of the opinion the petition should be granted.

/s/ Arabian
Acting Chief Justice

APPENDIX Q

SUPREME COURT OF THE UNITED STATES

No. 93-1279

THERESA REALI, *et al.*,

Petitioners

v.

FEMINIST WOMEN'S HEALTH CENTER

ON WRIT OF CERTIORARI to the Court of Appeal of California, Third Appellate District.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Court of Appeal of California, Third Appellate District for further consideration in light of *Madsen* v. *Women's Health Center*, 512 U.S. _____ (1994).

IT IS FURTHER ORDERED that the petitioners Theresa Reali, et al. recover from Feminist Women's Health Center Three Hundred Dollars ($300.00) for their costs herein expended.

June 30, 1994

Clerk's costs: $300.00

APPENDIX R

Third Appellate District No. C011874
S035226

IN THE SUPREME COURT OF CALIFORNIA

FEMINIST WOMEN'S HEALTH CENTER,

Respondent

v.

DON BLYTHE *Et Al.*,

Appellants

[Filed June 1, 1995]

Appellants' petition for review DENIED.

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
OCT 25 1995
CLERK

No. 95-366

In The

Supreme Court of the United States

October Term, 1995

THERESA REALI, et al.,

Petitioners,

vs.

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California

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TO THE HONORABLE SUPREME COURT:

The Respondent, Feminist Women's Health Center (FWHC), respectfully asks this Court to deny the Petition for Certiorari submitted by Petitioners.

REPORT OF OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 24, Supreme Court Rules, and Paragraph .2 thereof, Respondent adopts Petitioners' Report of Decisions Below, Jurisdiction and Statutes Involved, with the exception of two additional provisions of the California Constitution.

Article 1, section 1 of the California Constitution provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Cal. Const., art. 1, § 1.

Article 1, section 2, of the California Constitution provides, in relevant part:

> (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Cal. Const., art. 1, § 2.

STATEMENT OF THE CASE

Respondent is a nonprofit corporation operating four medical clinics in Northern California, including one located on J Street in Sacramento (hereafter the clinic) which is the subject of the injunction in this case. At the time of the events at issue, the clinic was open six days a week and provided gynecological health care, birth control services, pregnancy testing and screening, sexually transmitted disease testing and screening, and abortions. The clinic is on the second floor of a medical building in which several doctors' offices and a pharmacy are also located. The front entrance of the building opens onto a sidewalk running parallel to J Street along the entire length of the building and extending from the front of the building to J Street. The back entrance opens onto a 40-space parking lot to which there is access from I Street. Signs posted in the parking lot state that it is reserved for the use of tenants of the building and their customers and that trespassers will be prosecuted under Penal Code section 602 (trespassing). (Pet. at 4a).

Petitioners are Jay Baggett, Don Blythe, Murray Lewis, Theresa Marie Reali and John Stoos. (John Walker and Operation Rescue were defendants below, but since the appellate court reversed the trial court's award of attorney's fees as to them on the ground that state law precludes an award of attorney's fees against a defaulting defendant where a demand for such fees was not included in the complaint, they did not petition herein.) According to the record, Operation Rescue is a national anti-abortion group whose members are willing to risk arrest in an effort to blockade abortion clinics and make it

impossible for patients to enter medical facilities where abortions are performed. (Pet. at 5a).

The clinic opened in June 1987. Petitioners commenced anti-abortion demonstrations there in early 1988. Every Saturday, one or more of the petitioners and others would arrive at the clinic and use various techniques in an effort to counsel patients and persuade or stop them from submitting to abortions. These techniques included picketing in front of the medical building and in the parking lot, distributing anti-abortion literature both inside and outside of the medical building, blocking or impeding entrance to the building and the parking lot, hitting the hoods of cars entering the parking lot, blocking the doors of arriving patients' vehicles in the parking lot so that patients had difficulty getting out and entering the clinic, following patients in order to give them literature even if the patients indicated they were not interested, stepping into the paths of patients as they approached the clinic, urging patients not to "kill" their babies, shouting "murder, murder, murder" at patients, and pointing cameras at them. (Pet. at 5a).

The anti-abortion demonstrations have caused problems for patients trying to enter the clinic. As previously noted, among other things demonstrators have blocked patients at the entrance to the medical building and have refused to leave. The clinic has received telephone calls from patients in nearby phone booths complaining they were unable to enter the clinic. When clinic staff offered to help and went out to escort those patients into the building, the patients sometimes could not be found. Other patients rescheduled appointments to avoid the

demonstrations and called the clinic to request escort assistance into the building. Several times, police assistance has been necessary to stop blocking of the parking lot and building entrance and other activities of the demonstrators. After the district attorney's office declined to prosecute petitioners who had been arrested for trespass, the parking lot "became a sort of battleground," and patients were unable to get out of their cars or enter the building without being subjected to the conduct summarized above. (Pet. at 5a-6a).

The noise made by picketing demonstrators and the confrontations and other activities initiated by petitioners and others at the clinic have upset and agitated clinic patients. In some instances, patients have been reduced to tears. This heightened level of anxiety has required that abortion patients receive greater amounts of medication and has lengthened the time necessary to perform abortion procedures, thereby increasing the risks to patients. Heightened anxiety of staff members, including the doctors performing abortions, has impaired their concentration, further increasing the risks to patients. (Pet. at 6a).

On January 6, 1989, respondent obtained a temporary restraining order imposing time, place and manner restrictions on the anti-abortion activities of petitioners as well as their agents, servants, employees and representatives. On March 6, 1989, the court granted respondent's motion for a preliminary injunction. *Id.*

After the temporary restraining order and preliminary injunction issued, anti-abortion activities at the clinic continued, including the use of cameras, bumping into and pushing aside "escorts" hired by the clinic to

assist patients in entering the building, following patients into restricted areas, blocking cars attempting to enter the parking lot, persisting in offering literature refused by patients, blocking passage on the sidewalk in front of the medical building, and picketing in restricted areas. *Id.*

Defendants John Walker and Operation Rescue did not appear, and a default judgment was entered against them. Respondent's application for a permanent injunction was tried against the remaining petitioners, and judgment was entered in respondent's favor for a permanent injunction prohibiting (1) any activity within a "speech free zone" defined as a rectangle extending from the front of the medical building to three feet short of the curb on J Street and twenty feet on either side of the front door, (2) blocking ingress and egress of clinic patients and staff on the sidewalk in front of the medical building, (3) yelling or otherwise producing loud noise which interferes with clinic operations, (4) photographing or videotaping clinic patients, visitors or staff, (5) recording license plate numbers of vehicles visiting the clinic, (6) entering the medical building parking lot, (7) interfering with automobiles entering or leaving the parking lot, and (8) inducing others to do any of the above. (Pet. at 7a).

Following trial, respondent moved for an award of attorney fees pursuant to Code of Civil Procedure section 1021.5. The court awarded $99,106.98 against all petitioners jointly and severally. *Id.*

SUMMARY OF ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of discretionary jurisdiction as it does not conflict with any other opinions, chill first amendment rights, or prefer labor union demonstrators over anti-abortion demonstrators.

II. This case is completely consistent with *Madsen*, which does not require that a less restrictive prior injunction be issued before the final injunction is ordered.

III. The court below properly undertook an independent review of the record and correctly found that the evidence justified the injunction and the award of attorney fees.

IV. The decision in this case does not conflict with this court's doctrine of protecting mere advocacy speech.

V. The California Court of Appeal based its decision on independent and adequate state grounds, specifically the state constitution's right of privacy and the state statute authorizing the award of attorney fees in cases conferring a significant benefit upon the public.

REASONS FOR DENYING THE WRIT

The petitioners fail to satisfy criteria required for the grant of a Writ of Certiorari. The California appellate court, after twice undertaking an independent review of the record, properly decided that the injunction against unlawful conduct by petitioners that interfered with the rights of respondent health clinic and its patients respecting medical advice and abortion services, met the standards of *Madsen* and other opinions of this Court. The

award of attorney fees met the requirements of the state's public interest attorney fee statute, which is an analogue to the federal Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988. Finally, the decision below complies fully with federal constitutional guarantees and is based on independent and adequate state grounds, specifically the California Constitution's guarantee of privacy and the state's public interest attorney fee statute.

I.

THE AWARD OF ATTORNEY FEES TO RESPONDENT NEITHER "CHILLS" PETITIONERS' FIRST AMENDMENT RIGHTS NOR FAVORS LABOR PICKETERS OVER ANTI-ABORTION DEMONSTRATORS.

Petitioners' claim that the award of attorney fees operates to chill their rights to free speech is unavailing because their conduct exceeded the protection afforded by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution, and interfered with the exercise by others of the constitutional right to abortion. (*Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Wilson*, 234 Cal.App.3d 1662, 1670-1674 (1991); *Allred v. Shawley*, 232 Cal.App.3d 1489, 1501-1505 (1991); see also *Planned Parenthood v. Aakhus*, 14 Cal.App.4th 162, 175 (1993); *Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S.*, 557 F.Supp. 1190, 1202-1204 (E.D. Cal. 1983).) " '[T]he First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech, also protects [plaintiff's] right to abortion services and the patients' rights to receive those services.' . . . " (*Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349 (3d Cir.

1989), *cert. den. McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901 (1989), citation omitted.)

The record plainly shows that petitioners obstructed access to the medical building and parking lot. "[B]locking access to public and private buildings has never been upheld as a proper method of communication in an orderly society." (*New York State NOW v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989).) Petitioners also attempted to prevent clients from getting out of their cars by standing in front of car doors. At other times, petitioners positioned themselves so that when a patient got out of her car she was pinned between her car and the adjacent vehicle. Once a patient was able to leave her vehicle, petitioners' efforts to frustrate the patient's attempt to get to the clinic continued. After patients indicated a lack of interest in the demonstrators' views and expressed a wish to be left alone, petitioners continued to thrust literature at them, yell at the patients, and even chase some of them down the sidewalk. On one occasion, petitioner Baggett thrust a sign in a patient's face and would have hit her in the head if she had not moved out of the way. On another occasion, petitioner Reali, who was inside the building, chased a tearful woman and thrust anti-abortion literature at her. Furthermore, petitioner Blythe assaulted escorts who were attempting to assist women in gaining access to the clinic. (Pet. at 30a).

Respondent sought the injunction due to this type of conduct. According to respondent's executive director and the clinic administrator, although the picketing had been going on for a year, court action was not pursued until petitioners aggressively harassed women seeking abortion services and actually came into the building.

After the temporary restraining order issued, and again after the preliminary injunction was granted, respondent attempted to settle this matter. Respondent offered to stipulate to making the injunction permanent so as to avoid the necessity and cost of trial and, in return, to modify the injunction to make it less objectionable to petitioners. When respondent's efforts were unsuccessful, the matter went to trial. The relief granted in the permanent injunction was not significantly different than that granted in the preliminary injunction, including the exclusion of petitioners from the parking lot. (Pet. at 31a).

Consequently, the attorney fees incurred by respondent were necessitated by petitioners' refusal to limit their conduct to that protected by the First Amendment to the United States Constitution and by article I, section 2 of the California Constitution. If petitioners had not engaged in unprotected conduct, respondent would not have initiated this action and, thus, petitioners would not have incurred the attorney fees in question.

The attorney fee award does not operate to chill petitioners' rights to freedom of speech because it does not prevent them from continuing to demonstrate and exercise their free speech rights within the lawful limits set forth in the injunction. No legitimate claim can be made that the attorney fee award punishes petitioners after the fact for conduct they did not know was beyond the protected realm of their freedom of speech and, therefore, petitioners and others will be inhibited in the future exercise of their freedom of speech for fear of being "penalized" again. Even the most naive person would have known petitioners' conduct – obstructing access to a lawful enterprise and engaging in acts of assault and

harassment to prevent women who had expressed disinterest in petitioners' views from exercising the constitutional right to abortion – is not absolved by invoking the protections afforded by the First Amendment and article I, section 2. When a person oversteps the bounds of protected speech, civil and criminal liability may attach. (*Northeast Women's Center, Inc. v. McMonagle, supra,* 868 F.2d at pp. 1348-1350; cf. *Radich v. Goode,* 886 F.2d 1391, 1398 (3d Cir. 1989).)

This is precisely the kind of case in which attorney fees are appropriate. As stated in *Northeast Women's Center v. McMonagle, supra,* 889 F.2d at 477 where an attorney fee award was upheld under RICO by analogy to the federal Civil Rights Attorney Fee Award Act (42 USC § 1983 et seq.):[1]

> While defendants may have strong convictions against the wisdom or morality of women making a voluntary decision to obtain an abortion, under our Constitution and laws there is in this country no superior, dominant ruling class of citizens who may escape the consequences of their violent and lawless behavior. Neither those who believe strongly in the "right to life" nor

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[1] The analogy between the federal attorney fee statute and our state statute is apt. *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles,* 23 Cal.3d 917, 934 (1979) recognized that "in framing the provisions of section 1021.5 the Legislature drew heavily upon the pre-*Alyeska* opinion (i.e., *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240 (1975))," and that, accordingly, "such authorities . . . will often be helpful and reliable guides in interpreting the various provisions of the California statutes." See also on this same point, *Miller v. California Comm. on Status of Women,* 172 Cal.App.3d 837 (1985).

those who believe fervently in "freedom of choice" have any special immunity from the operation of the rule of law in our society.

Petitioners' argument that the award of attorney's fees against them treats them in a discriminatory manner *qua* labor union demonstrators is unpersuasive. They argue, as did the dissent in the appellate opinion below, that union members picketing their employers' businesses frequently have been enjoined from related conduct which unduly infringes on the employers' property rights, but no cases require individual union members to pay attorney fees incurred by the businesses in obtaining the injunctions. But attorney fees pursuant to Code of Civil Procedure section 1021.5, like attorney fees awarded pursuant to 42 U.S.C. § 1988, would not be warranted in an action to enjoin certain conduct of union members picketing their employer's business, even if the picketers' conduct included actions unprotected by the First Amendment. This is so because (1) injunctions obtained by employers do not necessarily confer a significant benefit upon the general public or a large class of persons, and (2) if employers champion only their individual property rights, the financial burden of litigation would not outweigh their personal stake in the matter. Hence, the analogy is, as the majority opinion stated, "inapposite."

More on point is this Court's holding that in a union member's suit against his union under the "free speech" provisions of the Labor-Management Reporting and Disclosure Act, it was within the equitable power of the federal courts to grant attorney fees against the union, since the plaintiff had conferred a substantial benefit on all the members of the union by vindicating their free

speech interests. *Hall v. Cole*, 412 U.S. 1 (1973). Because a court-ordered award of attorneys' fees in a suit under the free speech provision of the LMRDA promoted Congress' intention to afford meaningful protection for the rights of employees and the public generally, and because without provision of attorneys' fees an aggrieved union member would be unlikely to be able to finance the necessary litigation, *id.*, at 13, the Court held that the allowance of counsel fees was "consistent with both the [LMRDA] and the historic equitable power of federal courts to grant such relief in the interests of justice."

Similarly, the instant action resulted in the enforcement of an important right affecting the public interest and conferred a significant benefit on the general public or a large class of persons. Respondent was not defending its existence solely for a profit motive. Where an abortion provider is forced, directly or indirectly, to discontinue abortion services because of continued harassment, the ability of a woman to effectuate her abortion decision is compromised in violation of her rights. Without access to an abortion, the right to abortion is illusory. Respondent recognized this and explicitly sought injunctive relief to ensure that its patients had the continuing ability to obtain medical and abortion services. Hence, "[t]he interests of [respondent] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable. This action was brought to protect both [respondent] and its patrons; consequently, it cannot be exclusively characterized as a self-serving, private dispute commenced by [respondent] to protect its own pocketbook." (*Planned Parenthood v. Aakhus, supra*, 14 Cal.App.4th at p. 173.)

II

THE DECISION BELOW UPHOLDS A NARROWLY DRAWN TIME, PLACE AND MANNER INJUNCTION ON PETITIONERS' CONDUCT AND IS CONSISTENT WITH MADSEN.

Petitioners misstate the holding of *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). In *Madsen*, which also involved an injunction prohibiting anti-abortion protesters from demonstrating in certain places and in various ways outside a health clinic that performed abortions, this Court set forth and applied a standard for evaluating the constitutionality of content-neutral injunctions which restrict speech. Contrary to what petitioners' contend, however, nothing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite to a challenged injunction that creates a "buffer" or "speech free" zone. (Pet. at 16). The failure of a less restrictive order is simply a factor which "may" be considered in determining whether a content-neutral injunction burdens no more speech than necessary to accomplish a legitimate governmental interest. That the injunction challenged by petitioners satisfies *Madsen* is apparent from the appellate court's explanation after reconsidering upon remand from this Court its earlier opinion in light of *Madsen*:

> Here, the 20-foot speech-free zone, which is less restrictive than the buffer zone upheld in *Madsen v. Women's Health Center, supra*, was warranted in light of defendants' actions, including their violation of the temporary restraining order. The zone burdens the least speech necessary to protect access to the clinic and to reduce health risks to the patients by protecting the patients and medical staff from physical confrontations as they enter the clinic. *The small size*

> *of the zone and defendants' ability to congregate in the parallel three-foot strip ensures that anyone entering the clinic will hear the protesters' message and see any signs or pictures displayed by the demonstrators.* (italics added.)

(Pet. at 24a).

III

THE COURT BELOW UNDERTOOK AN INDEPENDENT REVIEW OF THE RECORD AND CORRECTLY FOUND THAT THE EVIDENCE JUSTIFIED THE INJUNCTION AND THE AWARD OF ATTORNEY FEES.

Petitioners misunderstand the meaning of "independent review." The appellate court was emphatic that, as it did before remand from this Court after *Madsen*, it had undertaken " 'an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,' " (*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-501, 507-511 (1984)) (citation original). (Pet. at 4a). Having done so, the court below found that the evidence supported the judgment, and then proceeded to summarize that evidence "in the light most favorable to the judgment." *Id.* This petitioners find objectionable, claiming that viewing the evidence in a way that is favorable to the judgment violates the standard of independent review. (Pet. at 24). To bolster their argument they quote from *New York Times v. Sullivan*, 376 U.S. 254 (1964) about the need in a libel action against a public figure for a reviewing court to make an independent review of the record. (Pet. at 23-24).

To be sure, many libel defendants have tried to convert the independent review rule into a requirement of *de novo* review, i.e., one that disregards the fact finder's findings altogether. The Court, however, has refused to take that step. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989). In *Connaughton*, the Court held that the jury's credibility determinations must be accepted unless they are clearly erroneous. Whether the clearly erroneous standard also governs review of other subsidiary fact findings from which the jury infers actual malice has not been decided. See *id.* at 689-90.

What this means in practice for both California appellate courts and federal courts following the mandate of this Court, is that

> The independent review standard does not require the appellate court to discard or ignore the reasoned conclusions of the lower court. To the contrary, the good work of the lower court is often of great benefit to the appellate court, as is proven by the number of rulings affirmed, often on the basis of the same reasoning employed by the lower court. Independent review does not mean uninformed or entirely new review; appellate courts are not required to reinvent the wheel already constructed partially or fully by the lower court. [¶] Independent review does mean, however, the appellate court is not constrained to give the lower court's conclusions any particular weight. If the appellate court believes the lower court erred, it need find nothing more, subject to the independent requirement that the error be prejudicial. The appellate court need not find, for

> example, that the error is "clear" or "manifest." It is enough that the appellate court disagrees with the lower tribunal's conclusion, and the appellate court is thus free to substitute its judgment for that of the lower tribunal.

J. Clarke Kelso, *Special Report on California Appellate Justice: A Report on the California Appellate System*, 45 Hastings L.J. 433, 467 (1994).

What obviously occurred here is that the appellate court twice reviewed the record independently and addressed all of the issues raised by petitioners, including the claim that the evidence did not support the judgment. Petitioners disagree, so they argue that the Court must have failed to engage in an independent review, as if that is synonymous with reversal. But independent review does not mean appellate reversal, and saying so does not make it true.

IV

THE DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DOCTRINE OF PROTECTED ADVOCACY.

Petitioners claim that the injunction against them in this case denies their free speech rights because it forbids them from "inducing, encouraging, securing or causing other persons to commit any of the [specified] acts." (Pet. at 26-28, 90a). They rely upon *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994) for their contention. In that case the U.S. Court of Appeals

for the D.C. Circuit found that use of the terms "encouraging" and "inducing" instead of *"inciting"* could be construed to proscribe "mere abstract advocacy of illegal sitins." *Id.* at 656.

In this case, however, the eight aforementioned "acts" which petitioners are enjoined from "encouraging" or "inducing" are so specific that it is difficult to imagine how mere "abstract advocacy" could mesh with them. How, for example, does one abstractly advocate that others "record license plate numbers of vehicles delivering or removing plaintiff's employees, agents, clients, visitors, or business invitees from [respondent's] premises"? (Pet. at 90a). Or how could mere abstract advocacy run afoul of the prohibition on "photographing or videotaping [respondent's] employees, agents, clients, visitors, or business invitees approaching, entering, or leaving [respondent's] premises"? *Id.* In other words, read in context, as must be done, the injunction herein which proscribes "encouraging" or "inducing" certain specific acts is indistinguishable from a prohibition on *"inciting"* the very same conduct. It is therefore unnecessary to order the replacement of the terms "encouraging" and "inducing" with the term "inciting" as was done in *National Organization for Women v. Operation Rescue, supra,* 37 F.3d at 658.

V

THE CALIFORNIA COURT OF APPEAL BASED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE GROUNDS, SPECIFICALLY THE STATE CONSTITUTION'S RIGHT OF PRIVACY AND THE STATE STATUTE AUTHORIZING THE AWARD OF ATTORNEY FEES IN CASES CONFERRING A SIGNIFICANT BENEFIT UPON THE PUBLIC.

This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. See, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-636 (1875). The starting point for determining whether an "independent" and "adequate" state ground exists, of course, is the state court opinion that accompanies the judgment. *Washington v. Chrisman*, 455 U.S. 1, 5 n.2 (1982); *Uhler v. American Fedn. of Labor-Congress of Indus. Orgs.*, 468 U.S. 1310, ___ (1984) ("The California Supreme Court ruled that the proposed initiative would violate both the Federal and State Constitutions, and a majority of this Court would probably conclude that there was an adequate and independent state ground for the state court's decision.") Beyond that, this Court may turn to other parts of the record, such as the trial court ruling, to determine if the judgment rests on independent and adequate state grounds. See *First National Bank v. Anderson*, 269 U.S. 341, 346 (1926); *Staub v. Baxley*, 355 U.S. 313, 318 (1958). Occasionally, this Court may examine state law and state precedents, particularly to determine the adequacy of the state ground. *Texas v. Brown*, 460 U.S. 730, 732 n.1 (1983)

(plurality opinion); *Ake v. Oklahoma*, 470 U.S. 68 (1985). On all three scores, it is beyond cavil that an independent and adequate state ground supports the appellate opinion in this case.

To begin with, the appellate court explained that its affirmance of the trial court's order creating an exclusion from the "speech free zone" served two interests:

> the property rights of the clinic and the privacy rights of clinic patients. Regarding the latter, *"[a]rticle I, section 1 of the California Constitution expressly makes the pursuit and obtaining of privacy an 'inalienable right.' The state right of privacy protects information about a citizen's participation in a medical procedure including abortion."* (Citation omitted) (*Italics* added.) (Pet. at 21a.)

Further, the trial court's order granting a permanent injunction against petitioners' harassment and interference with patients seeking medical advice about abortion from respondent clinic states, in relevant part:

> Because a woman's decision to terminate her pregnancy is one of the most private decisions imaginable and because it is protected by *both the United States and California Constitutions*, (*Roe v. Wade* [citation] (holding that the right of privacy, as guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy); *Chico Feminist Women's Health Center v. Scully*, 208 Cal.App.3d 230, 241-42 (1989), and cases cited therein), the State has a compelling interest to ensure that a woman has the ability to effectuate her decision within the limits specified in *Roe*, and to do so with the least harassment possible. (*Italics* added.) (Pet. at 84a.)

Finally, the specific pages referred to by the trial court in its citation to *Chico Feminist Women's Health Center v. Scully, supra,* 208 Cal.App.3d at 241-42 make clear that the basis for the appellate opinion's affirmance of the order is an "independent" and "adequate" state ground:

> It is unclear whether the federal right protects citizens from invasions of their privacy by private citizens or whether the federal right guards only against state action. [Citations.] *However, our state privacy guaranty is broader than the federal privacy right* (*Committee to Defend Reproductive Rights v. Myers,* 29 Cal.3d 252, 263 (1981).) *Article I, section 1 of the California Constitution expressly makes the pursuit and obtaining of privacy an "inalienable right." The state right of privacy protects information about a citizen's participation in a medical procedure, including abortion.* (See *People v. Stockton Pregnancy Control Medical Clinic, Inc.,* 203 Cal.App.3d 255, 241 (1988); *Planned Parenthood Affiliates v. Van de Kamp,* 181 Cal.App.3d 245, 276-278 (1986); see also *Binder v. Superior Court,* 196 Cal.App.3d 893, 901 (1987); *Wood v. Superior Court,* 166 Cal.App.3d 1138, 1147 (1985); *Board of Medical Quality Assurance v. Gherardini,* 93 Cal.App.3d 669, 679 (1979).) *And it has been held the state privacy right protects against invasions of privacy by private citizens as well as the state.* (*Porten v. University of San Francisco,* 64 Cal.App.3d 825, 829 (1976), followed in *Park Redlands Covenant Control Committee v. Simon,* 181 Cal.App.3d 87, 98 (1986) [citing other authorities following *Porten].*) (*Italics* added.) *Id.*

Thus a review of the appellate and trial court orders herein and the numerous state authorities upon which they rely make clear that the bases for these decisions

was the "independent" and "adequate" state ground of article I, § 1 of the California Constitution: the right of privacy which is broader than its federal counterpart.

CONCLUSION

For all the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THERESA REALI, MURRAY LEWIS, JOHN STOOS, JAY BAGGETT, and DON BLYTHE,

Petitioners,

v.

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California

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INTRODUCTION

This case involves a lawsuit by an abortion business, respondent Feminist Women's Health Center (FWHC), to restrict pro-life picketing, leafletting and counseling outside its abortion facility. FWHC succeeded in obtaining not only an injunction imposing a speech-free zone in front of the clinic, but also an award of some $100,000 in attorney fees.

Fully half of FWHC's Brief in Opposition to the Petition for Certiorari consists of paragraphs and sentences lifted verbatim from the lower court opinion. Not surprisingly, therefore, FWHC simply repeats the court's errors, and fails to address many of the issues raised in the petition. Thus, it stands undisputed that:

> 1) on at least two occasions the petitioners agreed to stipulate to an injunction prohibiting obstruction of access and other unlawful (and even lawful) conduct, thus rendering the litigation unnecessary to achieve that goal;
>
> 2) the court of appeal, in its purported "independent review of the record," failed to address even the most blatant errors in the trial court's findings of fact, such as the finding that access to the clinic was obstructed by crowds of "up to 150" anti-abortion demonstrators, when in fact, as petitioners pointed out to the court of appeal, these crowds were *pro*-abortion demonstrators; and
>
> 3) each of the petitioners may be liable for over $170,000,[1] based on the trial court's finding that they each committed "one or more" acts from a list of acts which includes constitutionally protected activity.

I. The Decision Below Conflicts with This Court's Decisions Forbidding Content-Based Regulation of Speech.

In its Brief in Opposition, FWHC for the most part simply repeats

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[1] The trial court initially awarded $99,106.98 in attorney fees, on September 30, 1991. App. 102a. On February 9, 1994, the court awarded $30,601.50 in attorney fees incurred in opposing petitioners' appeal. App. 105a. Interest on these judgments accrues at the rate of ten per cent per annum. Thus, at this time, petitioners' financial liability under this judgment is approximately $175,000. FWHC has recorded liens against the homes of three of the petitioners.

and restates the holding of the lower court, adding only an irrelevant discussion of the Labor-Management Reporting and Disclosure Act. Instead of explaining away the conflict between the lower court's holding and this Court's decisions in *Police Department v. Mosley*, 408 U.S. 92 (1972), and the other cases cited by petitioners, FWHC's brief highlights that conflict.

FWHC quotes *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 17 Cal. Rptr. 2d 510 (1993), for the proposition that "the interests of [respondent] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable." This "rule" means that any action taken by an abortion clinic to protect its business from picketers necessarily confers a significant benefit on its clients, and therefore warrants an award of fees under the relevant California statute. *See* Pet. at 3, 13–14. According to the court below, however, this same rule does not apply to action taken by other businesses seeking to protect themselves from labor picketing. Businessmen and employers not involved in abortion are presumed not to have conferred a benefit on the public, and to be acting solely from pecuniary motives. App. 33a–34a.[2] *See* Pet. § I.

The result of this reasoning is that those who speak on certain topics, and from certain viewpoints, are made to carry the extra burden of threatened liability for attorney fees, while other speakers face no such threat. This state-sanctioned discrimination violates the rights of free speech and equal protection, in conflict with this Court's precedents.

II. The Decision Below Conflicts with This Court's Decisions in *NAACP v. Claiborne Hardware* and *Hurley v. Irish-American Glib.*

FWHC relies on *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), for the proposition that the "clearly erroneous standard" may govern factual review in a free speech case. In fact, *Harte-Hanks* holds the opposite: "Although *credibility* determinations are reviewed under the clearly-erroneous standard . . ., the reviewing court must examine for itself the *statements* in issue and the *circumstances* under which they were made to see whether they are of a character which the principles of the First Amendment protect." *Id.* at 688 (emphasis added; footnote, citation and editing marks omitted).

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[2] Of course, the California courts may later decide to single out other types of businesses as "public interest" favorites, thus entitling them to fees as well.

Thus, *Harte-Hanks* confirms petitioners' position and is consistent with *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995). *Hurley* unequivocally holds that in a case like the present one, a reviewing court must make "an independent examination of the record as a whole, without deference to the trial court," to determine whether "the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct," on the one hand, or "on the field of free expression," on the other. *Id.* at 2344. The court below, contrary to *Hurley*, simply viewed the facts "in the light most favorable to the judgment" of the trial court. App. 4a; *accord*, App. 108a, 118a.

FWHC contends that the petitioners equate an independent review of the record with reversal of the trial court. Opp. at 16. FWHC also contends that the appellate court "obviously" twice reviewed the record independently and "addressed all the issues raised by the petitioners" before affirming the judgment of the trial court. *Id.* This conclusion is far from "obvious."

From the time the trial court decision was rendered in this case, petitioners have made a simple and reasonable request, namely, that the court state which of the petitioners supposedly committed what unlawful acts on what occasions, and what is the evidence supporting this finding. The reason for this request was plain: to confront the court with the *absence* of such evidence and to counter FWHC's explicit plea that all pro-life demonstrators be "tarred with the same brush." R.T. 837; Pet. at 5. The trial court refused to make such particularized findings. The appellate court affirmed the trial court's refusal to specify in its statement of decision what unlawful activity each defendant had engaged in, holding instead that it sufficed to identify the unlawful acts of *other* defendants and "other anti-abortion protestors." App. 80a.

After remand from this Court, the court of appeals again refused either to identify specific evidence or to remand to the trial court for further findings. The assurance of the court of appeal that it had made an "independent examination of the whole record" rings hollow in light of its steadfast refusal to cite any specific testimony or other evidence from the record to support its conclusions.

The lower court's failure to make specific findings is especially egregious in light of the petitioners' meticulous presentation of the record in their briefs. Time after time petitioners pointed to the lack of evidence

of unlawful conduct by petitioners and to the fact that other alleged conduct was only engaged in by the defaulting defendants or other unnamed persons, not petitioners. Yet the court refused, in its "independent examination of the whole record," to address any of these evidentiary defects. This Court's precedents forbids such obstinate "screening of reality." *See* Pet. § III.

The court's mere statement that it made an independent examination does not satisfy the constitutional requirement that the characterization of the petitioners' conduct as unlawful "must be supported by findings that *adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means*, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 933–34 (1982) (emphasis added).

Clearly, the court's conclusory statement that, e.g., "there is substantial evidence that defendants, as well as other protesters, interfered with the sidewalk access to the clinic by means of physical obstruction . . .," App. 23a, does not adequately disclose the evidentiary basis for that finding.

On the issue of obstruction, the trial court found that, on some days, "up to 150 [anti-abortion] picketers . . . would position themselves in front of Physician's Medical Building along the sidewalk on J Street . . . making a human wall which blocked the front entrance to the Physician's Medical Building." App. 80a. In fact, there was simply no evidence of any large demonstrations by pro-life picketers, other than one or two large pickets held in compliance with the terms of the preliminary injunction. The trial court must have mistakenly been relying on photographs submitted by the petitioners showing a demonstration of 150–200 abortion *proponents* standing with arms locked in front of the building, one of several such demonstrations about which petitioner Baggett testified.

The petitioners pointed this error out to the appellate court, only to be met with no response whatsoever. Whatever an "independent review" means, it must surely embrace some examination and comment on the record when appellants point out uncontested evidence that the appellees, not they, are responsible for conduct for which the appellants have been held liable.

Each time either the trial court or the appellate court has ventured to make specific findings, the petitioners have refuted the findings by citation

to the record showing that the evidence was irrelevant, misconstrued, or non-existent. This undoubtedly explains why the appellate court's attempt to do so was largely abandoned after the petition for rehearing, *see* App. 151a, as well as why it has refused to remand and direct the trial court to make specific findings.

III. The Decision Below Conflicts with This Court's Decision in *Madsen v. Women's Health Center*

A. *The decision below explicitly predicates liability on constitutionally protected activity.*

As noted in the Petition, the court of appeal not only failed to make an independent examination of the record, but also ratified the trial court's erroneous and exaggerated characterization of the evidence. Further, the court studiously ignored petitioners' showing that they had offered to stipulate to an order prohibiting obstruction and other unprotected conduct. The court insisted that the litigation resulted from the petitioners' assertion of a right to obstruct and assault FWHC's clients, when in fact the petitioners defended the suit simply to maintain their right to engage in speech activity on the public sidewalk and in the parking lot.[3]

However, the court of appeals went further than simply chilling these petitioners' legitimate exercise of their free speech rights. In holding that the trial court's statement of decision was adequate to impose liability on the petitioners, the court necessarily held that gathering, demonstrating, picketing, chanting, and leafletting outside abortion facilities are themselves unprotected, "wrongful" activities.

First the court catalogued the pertinent findings:

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[3] Petitioners' right, under the California Constitution, to engage in peaceful public expression on the parking lot was an open question at the time this case went to trial. In fact, the local district attorney had informed a FWHC representative that the parking lot in question was quasi-public and that police would not arrest people picketing there. R.T. 1019–20; *see also* App. 6a. The cases relied on by the court of appeals in holding that the parking lot of a medical facility is not a public forum were both decided *after* the trial in this case. *Allred v. Shawley* 232 Cal. App. 3d 1489, 284 Cal. Rptr. 140 (1991) (filed July 31, 1991); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427 (1991) (filed June 28, 1991).

> Here, the statement of decision indicated, for example, that "[d]efendants and others, on a fairly regular basis between January of 1988 and April of 1990, have gathered in front of the Physician's Medical Building at 3701 J Street to demonstrate against abortions[,]" "would waive [sic] signs at plaintiff's clients and staff[,]" "would also chant, yell and use noise-making devices such as bullhorns and trumpets[,]" "would also attempt to force literature on plaintiff's clients[,]" "would persist in their attempts even after the client indicated her refusal[,]" "would reach for, bump into and surround plaintiff's clients and any persons accompanying the clients[,]" and "would record the identities of [plaintiff's] clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers." No further specification is necessary.

App. 11a. Next, the court concluded that these actions, or any one of them, sufficed to establish liability:

> In their supplemental brief, defendants intimate that *Madsen v. Women's Health Center* . . . requires that specific findings of misconduct be made as to each defendant, rather than the trial court's generalized finding that defendants and others engaged in the *enumerated wrongful acts*. . . . It is sufficient the trial court found that defendants engaged in particular harassing and obstructive conduct and that the evidence discloses each of the defendants committed *one or more of the listed acts.*

App. 12a. (Emphasis added).

Thus, the lower court redefined protected speech activity such as picketing and leafletting[4] as "wrongful" conduct, and held that any individual who "commits" even one such act may be held liable for injunctive relief and substantial attorney fees.

B. *Confusion over the meaning of Madsen is growing in the lower courts.*

In the short period since the filing of the petition for certiorari, two

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[4] The trial court's statement of decision includes both "attempting to force literature" and "persisting in their attempts even after the client indicated her refusal." Thus, "forcing" literature means leafletting both *before* and after an intended recipient has indicated her refusal.

other decisions have come down, in the Second and Ninth Circuits, which dramatize the growing confusion of the lower courts over the meaning of *Madsen v. Women's Health Center* 114 S.Ct. 2516 (1994). Together with this case and a decision of the Supreme Court of California, these cases demonstrate the compelling need for review by this Court.

The first case, *Pro-Choice Network of Western New York v. Schenck*, No. 92-7302 (2d Cir. Sept. 28, 1995) (en banc) (1995 WL 570394), upholds both speech-free zones and personal "floating bubble" zones. These injunctive restrictions: (1) bar all "demonstrating" within fifteen feet of any doorway or parking lot entrance, as well as within fifteen feet of any person or vehicle seeking access to or leaving an abortion facility, except for sidewalk counseling by no more than two persons; and (2) prohibit such sidewalk counseling whenever the person counseled "wants to not have counseling, wants to leave, or walk away." A panel of the Second Circuit, properly applying *Madsen*, initially overturned these restrictions, which were in force at every abortion facility in the Western District of New York. *Pro-Choice Network of Western New York v. Schenck*, 34 F.3d 130 (2d Cir. 1994). After the appellate mandate had already issued, the Second Circuit allowed an untimely petition for rehearing en banc, and after rehearing reversed the panel.

The nine-judge lead opinion of Judge Oakes held that the speech restrictions were constitutional even though an initial, less restrictive temporary restraining order had already successfully ensured access.[5] Slip op. at 21-22. The lead opinion also held that this Court's decision did not invalidate a provision requiring counselors to back off fifteen feet whenever the intended audience requested. Slip op. at 26-27.

A ten-judge "concurring" opinion by Judge Winter was more sweeping in its revision of First Amendment law:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . .
>
> In my view, therefore, there is no right to invade the personal

[5] Like the court below in the instant case, the lead opinion minimized the significance of this Court's reliance in *Madsen* on the failure of an earlier, narrower order as a factor in upholding a broader injunction. Slip op. at 22; App. at 23a.

> space of individuals going about lawful business . . . or to do anything that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

Winter conc. at 5–6. In other words, everyone is a captive audience when coming from and going to a place of personal or professional business, simply because they did not choose to be exposed to the speech. The term "chilling effect" has been co-opted by Judge Winter to mean the effect of speech on the listener, not the effect of restrictions on a would-be speaker. Furthermore, Judge Winter explicitly endorses a one-strike-and-you're-out rule, by holding that even an isolated incident of obstruction may warrant a speech-free zone.

In an even more recent case, the Ninth Circuit upheld the imposition by ordinance of a personal "floating bubble" zone. *Sabelko v. City of Phoenix*, No. 94-15495 (9th Cir. Oct. 19, 1995) (1995 WL 611422), *rev'g* 846 F. Supp. 810 (D. Ariz. 1994). The challenged ordinance required any person engaged in "demonstration activity" within 100 feet of an abortion facility to "withdraw" at least eight feet from any person so requesting. The district court held that the restriction was unconstitutional, but a panel of the Ninth Circuit reversed. The majority held that *Madsen* had established standards for speech restrictions outside health care facilities, and that "the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a 'captive audience,' thus rejecting the position . . . that a public area adjacent to a health care facility must be considered, for all purposes, an open forum." 1995 WL 611422 at *3. The fact that *Madsen* itself struck down a ban on approaching without consent did not preclude a ban on failing to withdraw upon request. *Id.* at *3–*4.

However, as Judge Meskill noted in his dissent in *Pro-Choice Network*, this Court has limited application of the "captive audience" doctrine to cases in which the speech intrudes on the home, or in which "the audience is physically constrained by its environment." Meskill dis. at 16 (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). Consistent with those limitations,

> [t]he *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Id. at ii, n.5 (original emphasis).[6]

Like the majorities in *Pro-Choice Network* and *Sabelko*, the California Supreme Court has also stretched the interest in protecting the health and safety of patients inside medical facilities, as expressed in *Madsen*, to justify restrictions on speech on the public sidewalk where those coming and going from such facilities may be present. *Planned Parenthood Shasta-Diablo v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994) (upholding an injunctive speech-free zone even though the court explicitly acknowledged that access was not the issue, *id.* at 879 n.10, 873 P.2d at 1235 n.10, 30 Cal. Rptr. 2d at 640 n.10) *vacated*, 115 S. Ct. 413 (1994), *reinstated on remand*, 10 Cal. 4th 1009, 43 Cal Rptr. 2d 88, 898 P.2d 402 (1995), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576).

In *Madsen*, this Court formulated a demanding standard of review for speech-restrictive injunctions. 114 S.Ct. at 2525-26. *Madsen* plainly calls for meticulous parsing of both the injunctive provisions at issue and the factual circumstances alleged to support those restrictions. Yet, in the wake of *Madsen*, lower courts have disregarded both the heightened scrutiny and the demanding factual showing *Madsen* requires, and reduced it to a

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[6] *See also Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D. Cal. 1995), *appeal docketed* No. 95-55595 (9th Cir. May 5, 1995) (striking down ordinance establishing speech-free zones and personal bubble zones in front of health care facilities; "this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. [citing *Frisby v. Schultz*, 487 U.S. 474 (1988)]. The captive audience doctrine has been applied only sparingly in public fora. [citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)]").

simple license to uphold speech-free zones, whether stationary or floating, outside abortion facilities.[7]

IV. This Court Has Jurisdiction

FWHC claims that "independent and adequate state grounds" support the judgment below. Opp. § V. This argument is completely frivolous.[8]

This Court unquestionably has jurisdiction to review a state court's rejection, on the merits, of federal constitutional defenses. E.G., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* 28 U.S.C. § 1257(a) (this Court has certiorari jurisdiction over any final judgment of a state court of last resort "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

> When a state . . . court [of last resort] denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court. To suggest otherwise would contradict principles laid down in the Judiciary Act of 1789, 1 Stat. 73, 85 and settled since *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

Quinn v. Millsap, 491 U.S. 95, 104 (1989).

CONCLUSION

This court should grant the petition for certiorari.

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[7] *See also Hill v. City of Lakewood*, No. 94CA0856 (Colo. Ct. App. July 13, 1995) (1995 WL 411983), *petition for cert. filed*, No. 95SC593 (Colo. Sept. 15, 1995) (upholding statewide statute prohibiting, in vicinity of medical facility, approaching within eight feet of another person without prior consent, for the purpose of leafletting, picketing, or engaging in protest, education, or counseling).

[8] FWHC raised the issue of independent state grounds, in exactly the same language, in its opposition to the petition for certiorari filed by petitioners in 1994. FWHC apparently does not consider this Court's order vacating the lower court decision as a rejection of this specious argument.

Respectfully submitted,

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